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Supreme Court, U.S.
FILED
SEP 8 - 1995
OFFICE OF THE CLERK

No. 95-879

IN THE

Supreme Court Of The United States

October Term, 1995

JASON NEWKIRK, by Next Friends Daniel Newkirk and Nancy Newkirk, DANIEL NEWKIRK, and NANCY NEWKIRK,

Petitioners,

v.

MICHAEL FINK, individually and in his official capacity as Counselor of East Lansing Public Schools,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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September 8, 1995

Balmar Legal Publishing Services, Washington, D.C., (202) 682-9800

95 PP

QUESTIONS PRESENTED

1. WHETHER THERE IS A VIOLATION OF THE CONSTITUTIONAL RIGHT OF PARENTS TO CONTROL THE CUSTODY, CARE AND NURTURE OF THEIR CHILDREN WHEN THE STATE DISREGARDS EXPRESS PARENTAL INSTRUCTIONS THAT PSYCHOLOGICAL COUNSELING IS NOT TO BE GIVEN TO THEIR MINOR CHILDREN.

2. WHETHER THERE IS A VIOLATION OF CONSTITUTIONAL AND STATUTORY LAW WHEN PUBLIC SCHOOL OFFICIALS FAIL TO OBTAIN FULL, INFORMED AND WRITTEN CONSENT FROM PARENTS OR GUARDIANS OF ELEMENTARY SCHOOL CHILDREN, WHEN SCHOOL COUNSELING INVOLVES THE USE OF PROFESSIONAL PSYCHIATRIC TREATMENT TECHNIQUES.

LIST OF PARTIES

In addition to the parties listed in the caption, the following were parties to the proceedings in the United States District Court for the Western District of Michigan and the United States Court of Appeals for the Sixth Circuit: East Lansing Public Schools, Dr. William Mitchell, individually and in his official capacity as the Superintendent for Instruction, Sally McClintock, individually and in her official capacity as the Principal of Whitehills Elementary School, Jackie Killingsworth, individually and in her official capacity as a teacher, Ann Bloomquist, individually and in her official capacity as music teacher at the Whitehills Elementary School. In addition, the following were parties to the proceedings in the United States District Court for the Western District of Michigan: Creative Therapeutics, Inc., a New Jersey Corporation, and Dr. Richard Gardner, individually.

Petitioners are individuals and have no parent or subsidiary companies.

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No.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Opinion, Order and Partial Summary Judgment of the United States District Court for the Western District of Michigan, dated March 31, 1993, appears at Appendix A below. The Opinion and Partial Summary Judgment of the United States District Court for the Western District of Michigan, filed August 19, 1993, appears at Appendix B below. The Opinion and Order of the United States District Court for the Western District of

Michigan, granting Petitioners' motion to amend judgment in part and denying the same motion in part, dated December 16, 1993, appears at Appendix C below. Final judgment was entered by Stipulation and Order of the United States District Court for the Western District of Michigan, on March 28, 1994, and appears at Appendix D below. The Order of the United States Court of Appeals for the Sixth Circuit, affirming the judgments of the District Court, and dated June 13, 1995, appears at Appendix E below.

The Opinion and Order of the United States District Court for the Western District of Michigan, dismissing pendent state law claims in this matter, and dated July 29, 1991, appears at Appendix F below. The Order of the United States Court of Appeals for the Sixth Circuit, granting Petitioners' voluntary dismissal of an untimely appeal of a claim under 20 U.S.C. § 1232(h), and dated May 13, 1993, appears at Appendix G below. The Opinion and Order of the United States District Court for the Western District of Michigan, denying Petitioners' motion to file an amended complaint, and dated January 7, 1994, appears at Appendix H below.

JURISDICTION

This case seeks review of a decision of the Court of Appeals for the Sixth Circuit entered on June 13, 1995. This is a civil case.

Jurisdiction for review of this matter by certiorari is conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IX

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

United States Constitution, Amendment XIV

[N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In October, 1989, Jason Newkirk, an eight year old student at Whitehills Elementary School in East Lansing, Michigan, was a normal, quiet little boy. His third grade teacher, worrying that he was too quiet, arranged for him to have counseling to help him better "interact" with others. A telephone call was made to Jason's mother, suggesting Jason see the counselor to "play games," such as checkers, because he "needed a friend." No allegations of behavioral or discipline problems were made or discussed. Mrs. Newkirk verbally assented to Jason seeing Michael Fink, the school counselor, with the express understanding that it was only under these conditions that Jason would be permitted to meet with the counselor.

In November, the suggestion that Jason should be officially counselled was made by Mr. Fink to Mr. Newkirk. After discussion of the issues, Mr. Newkirk expressly forbade the counseling. In flagrant disregard of the Newkirks' express instructions and wishes, Mr. Fink began counseling Jason in January, 1990. The Newkirks' only became aware of the activities of the counselor after several months, and after they had on several occasions demanded to know what was happening at school, since their son was beginning to display emotional problems. The inappropriate use of a treatment tool designed to be used only by trained psychiatric professionals directly led to these emotional problems, which were eventually diagnosed by a psychiatrist retained by the family as separation anxiety disorder and panic attacks. No such symptoms had been exhibited before the "counseling" commenced.

The Newkirks' eventually were forced to remove Jason from Whitehills Elementary School, after continuing lack of cooperation from the school in regard to their orders not to continue this damaging counseling of their son, and the school's disregard of their requests for release of information regarding their son's school records.

Suit was filed against the school district and the counselor in July, 1991, and extensive and complex litigation has proceeded from that date. Subject matter jurisdiction was conferred on the District Court by 28 U.S.C. §§ 1331 and 1343(3). Pendent state law claims were dismissed by the United States District Court for the Western District of Michigan on July 29, 1991. The District Court granted partial summary judgment on March 31, 1993, holding that there was no Constitutional violation of parental rights in not obtaining their informed consent to the counseling, no coercion on eight year old Jason to attend the counseling sessions, and no parental right to object to the mental health "treatment" of Jason or even see the records. Final summary judgment was rendered on August 19, 1993.

By opinion of December 16, 1993, the District Court reopened the issue of a claim under the Protection of Pupil Rights Amendment ("PPRA"), admitting that the court had erred in considering the issue before Petitioners' had had the opportunity to conduct discovery, since Discovery had been stayed since December 9, 1992. Petitioners' motion to amend the complaint was denied by the District Court on January 7, 1994, and final judgment was entered on March 29, 1994.

Petitioners properly appealed the decision to the United States Court of Appeals for the Sixth Circuit which, on June 13, 1995, affirmed the decision of the District Court without rendering an opinion.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari in order to resolve the conflict with prior rulings of this Court that arises if the decisions of the lower courts are allowed to stand, and also to resolve the conflict with federal statutory and Constitutional provisions that arises if Petitioners' appeal is denied.

Decisions of courts in all circuits, including the Sixth Circuit, are in conflict with the decision in the instant case. This Court has consistently held that parents' rights to care and custody of their children and the liberty interest of parents and children to relate to one another in the context of the family, free from governmental interference, are fundamental rights protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. This Court has further held, and federal legislation has required, that health care, including mental health care, may only be given to minors with the informed consent of their parents or guardians.

This Court should also grant certiorari in order to provide guidance on an issue of paramount importance and to exercise its supervisory role over the federal court system. The national effect of disregarding precedent and permitting public officials to not only intrude into the Constitutionally protected relationship of the family, but to blatantly ignore the express instructions of involved, caring parents, to the extent that the parents are deliberately not informed of ongoing treatment, would be extremely detrimental. The balance of interests between parents and schools is a delicate one, but this Court has always maintained that parents and students do not give up their rights or relationship once the students cross the school threshold. Permitting the decisions of the lower courts in the instant case to stand would be to weigh the scale totally on the side of the school and to sacrifice the familial role and relationship. The demonstrable harm done to Petitioner Jason Newkirk in the instant case illustrates all too well one of the potentially damaging results of permitting such an imbalance.

Finally, this Court should grant certiorari in order to correct the error of the courts below in refusing to recognize the fundamental nature of the Constitutionally protected rights of parents and families, and in refusing to follow the law regarding proper and informed consent for psychological health care of minors.

These reasons for granting certiorari are further expanded hereafter in this Petition.

I. WHERE THE STATE DISREGARDS EXPRESS PARENTAL INSTRUCTIONS THAT PSYCHOLOGICAL COUNSELING IS NOT TO BE GIVEN TO THEIR MINOR CHILDREN, IT IS A VIOLATION OF THE CONSTITUTIONAL RIGHT OF PARENTS TO CONTROL THE CUSTODY, CARE AND NURTURE OF THEIR CHILDREN.

In *Prince v. Massachusetts,* 321 U.S. 158 (1944), this Court stated:

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.

Id. at 166. This was not a statement of mere sentiment. This was an affirmation of the underpinnings of the American Constitution and the fundamental nature of parental rights, which are "deeply rooted in the Nation's tradition and history." (*Moore v. City of Cleveland*, 431 U.S. 494, 503 (1977).)

The District Court, in its March 31, 1993, opinion, misapprehended the law regarding the fundamental nature of the rights of parents as against the right of schools to maintain order and discipline within the school walls. This misinterpretation of the law led directly to the awarding of summary judgment against Petitioners, and therefore constitutes irreparable harm to Petitioners and reversible error.

The court discussed at length the right of schools to maintain discipline and to effectuate disciplinary measures against children who are disruptive influences in class. As the court saw it, such authority is "often at the expense of a student's (and family's) privacy rights." (Appendix A, at page 11.) However, this discussion is predicated upon two false premises.

The first incorrect premise is that the actions taken by the school officials in the instant case were due to disciplinary problems. Contrary to the statement of the District Court, no allegations of disruptive behavior on the part of Jason Newkirk were made by school officials. The only incident which was alluded to by these officials was a playground incident which in fact occurred over one year *after* the initiation of counseling. Such an error on the part of the District Court, forming as it did the foundation for one of the principal grounds for its summary judgment decision, amounts to irreparable harm to the Petitioners.

The general discussion of the District Court in relation to the primacy of school rights over parental rights was also predicated upon the citing of several cases involving disruptive or potentially illegal behavior or speech of junior high or high school students. Not one of these cases involved students of elementary school age against whom no such allegations had been made. Absent these elements, parental rights may not be overridden, and certainly may not be cast aside as though they are of no importance. As this Court stated, in *Tinker v. Des Moines Independent Community School Dist.*, 383 U.S. 503 (1969):

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students.

Id. at 511.

The right of families to guide and direct their internal relationships is a "fundamental liberty interest protected by the Fourteenth Amendment," as this Court held in *Santosky v. Kramer*, 455 U.S. 743, 753 (1982). *Santosky* followed a venerable line of cases in which the family was recognized as a right of first importance by this Court, including *Meyer v. Nebraska*, 262 U.S. 390 (1923), where this Court recognized that the right to establish a home and bring up children is an essential part of the liberty interest guaranteed by the Fourteenth Amendment. And in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), this Court held unconstitutional an Oregon statute which prohibited parents from sending their children to private schools, because such a legislative act "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534-545.

One of the most eloquent statements of the dangers inherent in permitting rulings such as that in the instant case to stand is contained in the decision of the court in *Valent v. New Jersey State Board of Education*, 274 A.2d 832 (N.J.Super.Ch.Div. 1971):

> Is the State, through the educational system, permitted to encroach upon the patterns and molding of a child's behavior and personal, family or religious beliefs? Parental discipline, authority and respect diminish as the great sovereign State forces its way into the home as a foster parent. Some parents may be happy to be relieved of the obligation and responsibility. Others may feel that the constant eroding of their usefulness as parents portends great danger, and youth will look to the State rather than the parent, for guidance.

Id. at 839. This reflects very well the reaction of Petitioners when they finally discovered the high-handed actions of Respondent, and the damage that had been done their son.

In 1972, this Court again addressed the issue of the importance of upholding the primary role of parents in the nurturing of their children. In *Stanley v. Illinois*, 405 U.S. 645 (1972), this Court stated:

> It is plain that the interest of a parent in the *companionship, care, custody,* and *management* of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements."

Id. at 651 (quoting *Kovacs v. Cooper,* 336 U.S. 77, 95 (1949)) (emphasis added).

Thus, when the conflict between the rights of parents and the rights of schools is addressed, this Court has consistently made its position clear. In *Shelton v. Tucker,* 364 U.S. 479 (1960), this Court held that "[t]he vigilant protection of Constitutional freedoms is nowhere more vital than in the community of American schools." *Id.* at 487.

Where elementary school children are concerned, it is surely especially important that schools work *with* parents to ensure proper development and normal advancement. It is sophistry to argue that schools "know best" where children, whether they be outgoing or introspective, are concerned, and that the rights of all parents, whether good or bad, are jettisoned at the school threshold. It is more than sophistry to work against parents by deliberately disobeying express parental instructions and then, not only to encourage a child to deceive his parents, but to evade direct questions raised by the parents to those school officials.

We would respectfully submit that the impressionability of the very young, frequently recognized by this Court and lower courts[1], and the Constitutional protections afforded parents by

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[1] *See McCollum v. Board of Education*, 333 U.S. 203, 227 (1948) (the "law of imitation" operates where the young are concerned); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985) (the experience of young

this Court through the years, demand that school officials exercise zealous care that nothing is done which could adversely affect the future relationship of the student with his parents, or his capacity to partake fully of normal developmental stages and learning processes.

That Respondent manifestly failed to do this can hardly be denied, given that he directly and deliberately overrode Petitioner parents' instructions and caused such harm to Petitioner Jason Newkirk that Jason has required psychiatric treatment for severe separation anxiety and panic attacks. We therefore respectfully request that this Court afford Petitioners the opportunity to ensure that, not only are their rights vindicated, but that a clear message is sent to other schools who would arrogantly override the Constitutionally protected rights of parents and interfere in the vital and delicate relationship between parent and child.

II. WHERE ELEMENTARY SCHOOL CHILDREN ARE TO BE SUBJECT TO COUNSELING WHICH INVOLVES THE USE OF PROFESSIONAL PSYCHIATRIC TREATMENT TECHNIQUES, IT IS A VIOLATION OF CONSTITUTIONAL AND STATUTORY LAW TO FAIL TO OBTAIN FULL, INFORMED AND WRITTEN CONSENT FOR SUCH TREATMENT FROM PARENTS OR GUARDIANS.

> [H]istorically [the law] has recognized that natural bonds of affection lead parents to act in the best interests of their children.

Parham v. J.R., 442 U.S. 584 (1979).

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children is limited and their "beliefs consequently are the function of environment as much as of free and voluntary choice."); *Board of Education of the Westside Community Schools v. Mergens*, 110 S.Ct. 2356 (1990) (*secondary* school children are mature enough to understand the difference between school endorsement and tolerance of religion); *Thompson v. Waynesboro Area School Dist.*, 673 F.Supp. 1379 (M.D.Pa. 1987) (discussing the maturity of *junior high* school students).

Respondent, while seeking to assert his primary right to make decisions for Jason's care, was never able to put forward one example of how Petitioners' Daniel and Nancy Newkirk failed in their duty to seek the best for their son. Petitioner parents displayed great concern and involvement in their son's life, and repeatedly sought discussion with school officials on his progress and events in his school life. Respondent surely cannot claim that he knew Jason better than the parents who have loved and nurtured him from birth.

The arrogance of Respondent is nowhere displayed more graphically than in his assertions that he had the right to subject Jason to what amounted to mental health treatment without obtaining permission for such treatment from his parents. The "counseling" sessions to which Jason was subjected were not merely chats designed to bring Jason out of himself. They were sessions where a psychiatric treatment modality was used by a social worker without the consent required by state and federal law.

The Talking, Feeling, and Doing Game is a therapeutic tool distributed with a warning that it is "designed to be used *only* by mental health professionals in their therapeutic work with children. Accordingly, every reasonable attempt is made to limit the sale and distribution of the game to such professionals." Mr. Fink is *not* such a professional.

This "game," subtitled *A Psychotherapeutic Game for Children*, is utilized as part of the psychiatric treatment of children. Utilizing it in the "counseling" of Jason Newkirk therefore amounts to more than school counseling. It represents mental health treatment. No school official has the right to dispense mental health treatment, and in the process invade the privacy of the family home, without first obtaining written, full, and informed consent from the parents or guardians of the eight-year old.

Some of the questions contained within the "game" played with Jason included:

(1) What do you think about a boy who sometimes wished that his brother were dead?

(2) What is the worst thing you can say about your family?

(3) A girl was listening through the keyhole of the closed door of her parent's bedroom. Her parents were talking and didn't know she was there. What did she hear them say?

(4) What "turns you on?"

In addition, questions were asked from another book, entitled *The Kid's Book of Questions*. These included questions such as:

(1) If something happened to your parents and you had to live with someone else for two years, who would you most like to be with?

(2) What do your parents do that embarrasses you the most?

(3) Pretend there are three people in a doctor's office: a one-year-old baby, a grandmother with a lot of grandchildren who love her, and a teenager who works hard but just flunked out of high school. They are all seriously ill but you can save one of them. Which would you pick?

Respondent claimed that the sessions did not intrude into the Constitutionally protected family relationship of Jason and his parents. He further claimed that no consent was necessary from the parents for the use of these tools. The District Court, in its March 31, 1993, opinion on summary judgment, found that it would not "make sense" to seek consent for this treatment (Appendix A, at pages 14-15). Both Respondent and the District Court were in error.

Questions as innocuous as how much a student's family "loved him or her," whether the parents "seemed to know what the student's needs or wants are," and whether they "hugged and kissed him good-night when he was small," were struck down by the court in *Merriken v. Cressman*, 364 F.Supp. 913 (E.D.Pa. 1973) as being violative of the Constitutional right to privacy. The questions in *Merriken* were contained in a personality questionnaire but, as the court stated:

> These questions go directly to an individual's family relationship and his rearing. There probably is no more private a relationship, excepting marriage, which the Constitution safeguards than that between parent and child. This Court can look upon any invasion of that relationship as a direct violation of one's Constitutional right to privacy.

Id. at 918. The questions being asked of Jason Newkirk by Respondent Fink were far more intrusive than in *Merriken,* and likewise violated the Newkirk family's right to privacy.

The *Merriken* court further discussed the issue of waiver of Constitutional rights by consent to the invasion of the family's privacy, and stated that the facts showed that:

> the parents could not have been properly informed about the CPI Program and as a result could not have given informed consent for their children to take the CPI test.

Id. at 919. In the instant case, the risks and benefits of the proposed "counseling" of Petitioner Jason Newkirk were not discussed with Petitioner parents. Consent was not only withheld, it was refused. There was no waiver of Petitioners' Constitutional rights.

In its March 31, 1993 opinion, the District Court cited circumstances in which consent need not be sought from parents when schools wish to counsel students. None of these circum-

stances were relevant to the instant case. This was not a case where the student sought counseling because he was experiencing difficulty with his parents. In fact, Jason has stated that he never understood why he was sent to the counselor. He felt he had no choice in the matter, especially when Respondent Fink instructed him that he could not tell his parents about the sessions. As an impressionable eight-year-old, it is understandable that he felt this way. As Justice Frankfurter said, in *McCollum v. Board of Educ.*, 333 U.S. 203 (1948): "[N]onconformity is not an outstanding characteristic of children." *Id.* at 227.

There was no allegation of disruptive behavior in the instant case, so the reliance of the District Court on such cases in deciding that there was no necessity for consent was inappropriate. Further, the argument of the court that the case of *Arnold v. Board of Education of Escambia County Alabama*, 880 F.2d 305 (11th Cir. 1989), supported the position of Respondent and the Court, was legally and factually incorrect.

Arnold involved a fourteen-year-old girl seeking an abortion. It was held that there was no Constitutional or statutory requirement to notify the parents of the girl that she was being counseled in respect of the abortion decision. However, two extremely important differences between the *Arnold* situation and the instant case should be emphasized. The first relates to the difference in the ages of the children involved, and the second is the question of what amounts to coercion on the child not to inform the parents about the counseling.

Although there is much discussion among professional psychologists, doctors, lawyers and legislators about the age at which children should be permitted to make independent decisions concerning their own health care, there are no respected authorities who hold that a child of eight has capacity to give independent consent for mental health care treatment. The Constitutional right of parents to direct the care of their young

children is recognized in all circuits, and federal and state legislatures have embodied this tradition in law. (*See*, e.g., in Michigan, MCL § 330.1498j; MSA § 14.800 (498j) (1993) (consent for hospital treatment of emotionally disturbed minors); MCL § 300.1716; MSA § 14.800 (716) (1993) (consent for surgery in mental health care treatment setting); MCL § 600.2157; MSA § 27A.2157 (1993) (permitting parents to obtain medical records of their minor children.)

Dr. William Decker, M.D., the board certified psychiatrist who was responsible for establishing one of the first psychiatric treatment institutes for children in the United States, and who was consulted by Petitioners after they found out about the "counseling" sessions, states in the record:

> [N]o competent psychological or psychiatric professional, acting within the bounds of professional ethics, practices or standards, would treat a minor of this age in this way without the informed consent of the minor's parents. . .

Affidavit of William Decker, M.D., p. 6, ¶ 21.

The general rule that full, informed parental consent is required for all forms of medical treatment is subject to few exceptions, none of which pertain in the instant case. This was not an emergency situation, and Jason Newkirk certainly did not come within the so-called "mature minor" exception. The parents were not inaccessible, and by no stretch of the imagination could they be accused of being neglectful of their child's welfare.

In its opinion, the *Arnold* court stated that "counselors must not coerce minors to refrain from communicating with their parents." (*Arnold,* 880 F.2d at 314.) This was regarded as the bare minimum necessary to ensure that the Constitutional rights of the parents were not violated. The record in the instant case shows that Jason Newkirk was told by Respondent Fink that

"you can't tell your parents about this." When Respondent Fink told Jason that he couldn't trust anyone, including his parents, and asked questions such as "how do you know [your parents] won't leave you," Jason became convinced he was being prepared for the departure of his parents. Not surprisingly, he became emotionally disturbed by the thought of such a traumatic event. Such behavior by Respondent Fink cannot be characterized as anything other than coercion of an impressionable eight-year-old boy, and the District Court erred in holding that no coercion took place, and that no violation of Petitioners' Constitutional or statutory rights occurred.

In citing *Arnold* with approval in its March 31, 1993, opinion, the District Court quoted a part of the judgment which ended "we do not seek to curtail the beneficial use of counseling." (*Arnold*, 880 F.2d 305, at 314.) (Appendix A, at page 14.) The unauthorized counseling in the instant case was far from "beneficial." As Dr. Decker concluded, after reviewing the facts and materials:

> [T]he affiant expresses his opinion, based upon a reasonable degree of probability in the field of psychiatry, that the school counseling by Mr. Fink, was the direct and proximate cause of Jason's severe separation anxiety disorder with panic attacks.

Affidavit of William Decker, M.D., p. 3, ¶ 10. If the law had been followed, and informed consent sought from Petitioner parents, the harm done to Jason Newkirk would have been avoided.

It was incumbent upon Respondent to discuss with Petitioner parents the risks and benefits of the mental health care treatment he proposed to render to Petitioner Jason Newkirk, and obtain informed, written consent from Petitioner parents. By wilfully failing to do so, he violated Petitioners' Constitutionally protected parental and privacy rights, and further violated federal and state statutes regarding parental consent.

CONCLUSION

Petitioners submit that Petitioners have clearly demonstrated a violation by Respondent of their Constitutionally protected right to privacy and Petitioner parents' Constitutionally protected right to the care, custody and management of their children, which rights the lower courts failed to uphold according to law and precedent.

Petitioners further submit that the failure of Respondent to obtain full and informed consent from Petitioner parents for the mental health care counseling of Petitioner Jason Newkirk violates Petitioners' rights as protected by the United States Constitution and federal and state law, which rights the lower courts also failed to uphold according to law and precedent.

Accordingly, we respectfully request that this Court grant the Petition for Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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September 8, 1995



UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

JASON NEWKIRK,
by Next Friends, Daniel
Newkirk and Nancy Newkirk;
DANIEL NEWKIRK;
and
NANCY NEWKIRK

Plaintiffs,

v

EAST LANSING PUBLIC SCHOOLS;
DR. WILLIAM MITCHELL; individually and in his
official capacity as the Superintendent for Instruction;
SALLY McCLINTOCK, individually and in her official
capacity as the Principal of Whitehills Elementary School;
JACKIE KILLINGSWORTH, individually
and in her official capacity as a teacher;
ANN BLOOMQUIST, individually and in her official
capacity as music teacher at Whitehills Elementary School;
MICHAEL FINK, individually and in his official capacity
as Counselor of East Lansing Public Schools;
CREATIVE THERAPEUTIC, INC.,
a New Jersey Corporation
and
DR. RICHARD GARDNER, individually,

Defendants.

File No. 1:91:CV:563
HON. RICHARD A. ENSLEN

OPINION

This matter is before the Court on four summary judgment motions filed by all of the defendants. The underlying com-

plaint alleges that defendants violated plaintiffs privacy rights under the United States Constitution. Also, plaintiffs assert that defendants have violated the Protection of Pupil Rights Amendment ("PPRA"), 20 U.S.C. § 1232h.

Defendants, a public school district and public employees who work for the school district, have brought summary judgment motions on a number of theories. As to count I, defendants argue that plaintiffs have not shown that any privacy rights under the Constitution were violated. Also, defendants seek qualified immunity. Finally, as to count II, defendants claim that PPRA does not provide for a private cause of action.

Facts

According to the complaint, the relevant facts are as follows.[1] In October 1989, defendant Jackie Killingsworth, a third grade teacher at Whitehills elementary school in East Lansing, Michigan, telephoned plaintiff Nancy Newkirk, about Ms. Newkirk's son, plaintiff Jason Newkirk. Ms. Killingsworth informed Ms. Newkirk that she (Ms. Killingsworth) was having Jason see defendant Michael Fink, a counselor at Whitehills. Apparently, Jason was having difficulty interacting with the other children his age. Observing this fact, Ms. Killingsworth believed that Jason "needed a friend." After the discussion between Ms. Killingsworth and Ms. Newkirk, Ms. Newkirk consented to having Jason see Mr. Fink, specifically so that Mr. Fink could "play games" with Jason. Ms. Newkirk allegedly "made it clear" that she did not want Mr. Fink counseling Jason.

[1] Because this motion for summary judgment is brought by defendants, I will detail the facts from plaintiffs complaint (rather than from any of the defendants' pleadings) in large part because the summary judgment standard requires that I view the facts in a light most favorable to the non-moving party. *See, e.g., Matsushita Electric Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)), *quoted in Historic Preservation Guild v. Burnley*, 896 F.2d 985, 993 (6th Cir. 1989).

Shortly thereafter, Ms. Killingsworth filled out a "Referral to child guidance consultant" form on or about November 3, 1989. Sometime later that month, Mr. Fink allegedly talked to plaintiff Daniel Newkirk concerning Jason's difficulties, e.g., failure to socialize with other children. In this conversation, Mr. Fink indicated that he should counsel Jason. Mr. Newkirk refused to give permission to Mr. Fink to counsel Jason. Apparently, parental consent was never given to Mr. Fink by Mr. or Ms. Newkirk to counsel Jason.

In or about January 1990, Mr. Fink allegedly began counseling Jason. At the same time that these counseling sessions began, Jason began to show signs of separation anxiety disorder. Additionally, Jason allegedly began suffering from panic attacks. In June of 1990, Mr. and Ms. Newkirk discovered that Mr. Fink was counseling Jason.[2] The Newkirks asked Mr. Fink what sort of counseling he engaged in with their son. They received some of this information and sent it to defendants William Mitchell (Superintendent of East Lansing Schools) and Sally McClintock (Principal at Whitehills). For the most part, however, plaintiffs argue that they were denied access to Jason's counseling material by defendants Mitchell, McClintock and Fink.

Finally, plaintiffs allege that defendant Ann Bloomquist, a music teacher at Whitehills, utilized "psychotherapeutic materials" on Jason Newkirk without the "informed consent" of Mr. & Ms. Newkirk. Moreover, plaintiffs assert that "psychotherapeutic and quasi-psychotherapeutic" activities are "prevalent" in the East Lansing Public Schools. In particular, plaintiffs indicate that a "conflict resolution" curriculum is utilized in a social studies class at Whitehills. Plaintiffs never consented to this curriculum — nor were they able to exclude Jason from this curriculum.

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[2] Apparently, Jason informed his parents that he felt "weird and uncomfortable" when talking with Mr. Fink.

As a result of the counseling by Mr. Fink, the use of "psychotherapeutic" material by Ms. Bloomquist, as well as the utilization of conflict resolution curriculum at Whitehills school, Jason has allegedly suffered "severe and grievous injuries, disabilities and damages resulting in a disruption of the Plaintiff parents' home...." Plaintiffs' Complaint ¶ 44.

Standard

A motion for summary judgment requires this Court to view "'inferences to be drawn from the underlying facts ... in the light most favorable to the party opposing the motion.'" *Matsushita Electric Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)), *quoted in Historic Preservation Guild v. Burnley*, 896 F.2d 985, 993 (6th Cir. 1989). On the other hand, the opponent has the burden to show that a "rational trier of fact [could] find for the non-moving party [or] that there is a '*genuine issue for trial*.'" *Historic Preservation*, 896 F.2d at 993 (quoting *Matsushita*, 475 U.S. 587).

As the Sixth Circuit has recognized and consistently emphasized, recent Supreme Court decisions encourage the granting of summary judgments where there are no material facts in dispute. *Historic Preservation*, 896 F.2d at 993 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)). The courts have noted that the summary judgment motion may be an "appropriate avenue for the 'just, speedy and inexpensive determination' of a matter." *Cloverdale Equipment Co. v. Simon Aerials, Inc.,"* 869 F.2d 934, 937. (6th Cir. 1989) (quoting *Celotex*, 477 U.S. at 327). Consistent with the concern for judicial economy, "the mere existence of a scintilla of evidence in support of the [non-moving party's] positions will be insufficient." *Anderson*, 477 U.S. at 252. "Mere allegations do not suffice." *Cloverdale*, 869 F.2d at 937. "[T]he party with the burden of proof at trial is obligated to

provide concrete evidence supporting its claims and establishing the existence of a genuine issue of fact." *Id.*

Discussion

Count I - Privacy Rights

Count I of plaintiffs' complaint is based on privacy rights. Certainly, as the parties point out, this right is difficult to define. Both parties agree that no court has ever recognized a right to privacy in a factual situation similar to the case before the Court. This, of course, does not mean that no such right exists. Instead, the Court must look to analogous situations in order to determine if a right to privacy exists here.

Plaintiff has cited a large number of cases which have recognized a right to privacy in a variety of settings. While several of these cases are not on point, they are helpful in determining the scope of the constitutionally protected right to privacy. For instance, a number of courts have recognized that the constitution protects the parent-child relationship and that governmental interferences with that relationship gives rise to a cause of action in favor of the parents under § 1983. See *Kelson v. City of Springfield*, 768 F.2d 651, 654 (9th Cir. 1985) (parents had cause of action for state interference resulting in minor child's suicide); *Trujillo v. Board of County Commissioners for the County of Santa Fe*, 768 F.2d 1186-90 (10th Cir. 1985) (parents and sibling had cause of action for lost freedom of "intimate association" where state action deprives adult child/sibling of life without due process); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1243-45 (7th Cir. 1984) (parent had cause of action wrongful death of adult child); *Logan v. Hollier*, 711 F.2d 690, 680-91 (5th Circ. 1983), *cert. denied*, 466 U.S. 936 (1984) (recognizing mother's "constitutionally protected liberty interest in parenthood"); *Mattis v. Schnarr*, 502 F.2d 588, 593-95 (8th Cir. 1974); *Jones v. McElroy* 429 F. Supp. 848 (E.D. Penn. 1977). *But see Valdivieso Ortiz v. Burgos*, 807 F.2d 6, 8-9 (1st

Cir. 1986) (declining to recognize constitutional interest in relationship with adult child); *Jackson v. Marsh*, 551 F. Supp. 1091, 1094 (D. Colo. 1982) (same).

The Sixth Circuit has recognized that parents have a constitutionally protected liberty interest in the maintenance of their relationship with their children. In *Doe v. Staples*, 703 F.2d 985, 988-89 (6th Cir. 1983), the court recognized that "it is axiomatic that a parent has a liberty interest in the freedom of personal choice in matters of family life in which the state cannot interfere. This liberty interest has been labeled an essential or fundamental interest." *See also Littlejohn v. Rose*, 768 F.2d 765, 766 (6th Cir. 1985) ("Decisions of the Supreme Court have firmly established that matters relating to 'marriage [and] family relationships' involve privacy rights that are constitutionally protected against unwarranted governmental interference"); *Sims v. Waln*, 536 F.2d 686, 689 (6th Cir. 1976) ("The Supreme Court has long recognized the constitutional status of parental rights to bring up their children"); *Elam v. Montgomery County*, 573 F. Supp. 797, 802-03 (S.D. Ohio 1983) (father has constitutionally protected liberty interest in custody of his minor child which cannot be deprived without due process of law).

Moreover, a long line of Supreme Court decisions recognizes that parents have a constitutionally protected "interest in the companionship, care, custody, and management" of their children. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). As the Court noted in *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), "It is cardinal with us that the custody, care, nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." The Supreme Court has granted parents rights to oversee the moral, religious and educational development of their children. *See Moore v. City of East Cleveland*, 431 U.S. 494, 500-01 (1977); *Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968);

Pierce v. Society of Sisters, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

The constitution also protects a parent's right to custody of his or her children:

> The due process clause requires that severances in the parent-child relationship caused by the state occur only with rigorous protections for the individual liberty interests at stake. *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981); *Little v. Streater*, 452 U.S. 1, 13 (1981); *Smith v. Organization of Foster Families*, 431 U.S. 816, 842 (1977); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). The state may not separate the parent from the child, even temporarily, without according them due process of law to protect their liberty interests. See *Lassiter*, supra; *Stanley*, supra. Indeed, the Supreme Court has accorded the parent-child relationship these protections whether legitimized by marriage or not, and due process is implicated in state involvement in both the termination and the imposition of those bonds.

Bell, 746 F.2d at 1243-44. *See also Kelson*, 767 F.2d at 654 (*Santosky*, *Lassiter* and *Streater* "rendered beyond dispute the proposition that parents have a fundamental liberty interest in maintaining a relationship with their children that is protected by the Fourteenth Amendment").

On the other hand, when dealing with the rights of students, courts have been less willing to find a broad right of privacy. While it is true that students do not shed their constitutional rights "at the schoolhouse gate," *Tinker v. Des Moines Independent Comm. School Dist.*, 393 U.S. 503, 506 & 511, it is also true that the Federal Constitution does not compel "teachers, parents, and elected school officials to surrender control of the American public school system to public school students."

Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 686 (1986) (quoted in *Polino v. Murphy,* 872 F.2d 757, 762 (6th Cir. 1989)).

For instance, in *New Jersey v. T.L.O.,* 469 U.S. 325 (1985), the Supreme Court significantly undermined the privacy rights of students at school, ruling that school authorities could search a student's purse, locker, or other property without a search warrant or even without a showing of probable cause. Instead, the majority ruled that such a search could be permitted simply if it was "reasonable," and even suggested that individualized suspicion that a particular student had committed a wrong may not be necessary. *Id.* at 342, n.8.

A number of lower federal courts are in accord with the holding in *T.L.O. See, e.g., Acton v. Vernonia School Dist. 47J,* 796 F. Supp. 1354, 1361 (D. Or. 1992) (in upholding random drug testing of student athletes, the court held, "courts have acknowledged that the public school is a unique setting in which the constraints of the Fourth Amendment are 'relaxed.' "); *Bahr v. Jenkins,* 539 F. Supp. 483 (E.D. Ky. 1982) (no constitutional violation in warrantless search of student's purse); *Williams v. Ellington,* 936 F.2d 881 (6th Cir. 1991) (School officials enjoyed qualified immunity in case against them for violation of constitutional rights stemming from a warrantless strip search of student); *Edwards v. Rees,* 883 F.2d 882 (10th Cir. 1989) (twenty minute interrogation of a student not unconstitutional). All of these decisions clearly recognize that a school must be able to maintain discipline. In Bahr, for instance, the court offered some interesting dicta about discipline in the public schools and students' privacy rights:

> The importance of the education of the young cannot be overemphasized. Every philosopher of government, from Plato on down, has emphasized the importance of educating the young to preserve the country for future generations and has recognized the young

as a natural resource, if you want to call it that, that has to be developed. There is nothing new about that.

* * *

[T]here is no constitutional right to be free of discipline, even strict discipline, when you are a part of an institution where discipline is appropriate . . . And especially, I think, is discipline necessary in the school. I can't think of any type of human endeavor, other than perhaps [service in] the armed forces, where discipline would be more necessary than in a high school.

Common sense requires that the Constitution must be interpreted in the light of certain facts, which are inherent in the human condition. In interpreting the Constitution, I think we have to be guided by the following principles that are dictated by common sense.

The first of these principles is that the purpose of schools is to teach. The second is that an atmosphere of calm and order is required if kids are going to learn.... The third principle dictated by common sense is that kids are immature. That's why they are kids and not adults. That's why we have the compulsory school system and why that system has to have rules. The fourth principle is that kids, because they are immature, don't like the atmosphere of calm and order required for learning. They like turmoil and excitement.

* * *

If you have 95 calm, orderly kids who are willing to learn something, and you have 5 kids who want to entertain themselves by causing a disturbance, you better do something about the 5 kids and do it quickly

> or you are going to have 100 kids who are causing a disturbance and nothing is going to be learned that day.
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> * * *
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> Does this mean that children in school have no constitutional rights? Of course not. They have a right to privacy, interpreted in light of common sense considering the fact that they are there to learn something and they have to be controlled if they are going to do it. If think the rule of reason is the lodestar by which the Constitution ought to be interpreted in defining the right of privacy under these circumstances.

Id. at 485-87; *see also Jackson v. Dorrier,* 424 F.2d 213 (6th Cir. 1970) (students did not have a privacy right to wear their hair long).

Besides being able to maintain discipline by searching students without probable cause or warrants, school employees (e.g., teachers and principals) may use corporal punishment as a means of deterring certain behavior, as long as the punishment is not a "brutal and inhumane abuse of ... official power, literally shocking to the conscience." *Archey v. Williamson County Bd. of Education,* 1991 U.S. App. LEXIS 12657, *4 (6th Cir., June 11, 1991)(quoting *Webb v. McCullough,* 828 F.2d 1151, 1159 (6th Cir. 1987)). Certainly, it would seem that a parents' right to raise their children includes the right to discipline (or not to discipline) their children as they desired. On the surface, it appears that corporal punishment would violate the child's privacy rights, as well as the family's right to privacy. However, courts have not extended the right to privacy to include a restriction on school's ability to discipline students — and in particular, in a school's ability to use corporal punishment that is not "shocking to the conscience."

Courts recently have also held that schools may restrict student speech.[3] *See, e.g., Poling v. Murphy*, 872 F.2d 757 (6th Cir. 1989). In *Poling*, the Sixth Circuit held that a student did not have any recourse under the United States Constitution when he made "rude" and "discourteous" remarks as a part of his speech to a student assembly. The student, who was running for elective office in the school, was banned from the election because of his remarks. In so holding, the Sixth Circuit noted,

> [l]ocal school officials, better attuned than we to the concerns of the parents/taxpayers who employ them, must obviously be accorded wide latitude in choosing which pedagogical values to emphasize, and in choosing the means through which those values are to be promoted. We may disagree with the choices, but unless they are beyond the constitutional pale we have no warrant to interfere with them. Local control over the public school, after all, is one of this nation's most deeply rooted and cherished traditions. *See Milliken v. Bradley*, 418 U.S. 717, 741-42, 94 S. Ct. 3112, 3125-26, 41 L. Ed. 2d 1069 (1974).

Poling, 872 F.2d at 762-63.

In sum, then, it is clear that schools have broad authority to maintain discipline — often at the expense of a student's (and family's) privacy rights.

Here, plaintiffs have essentially made two claims[4] : (1) that their privacy rights were violated because Jason was sent to the

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[3] These decisions come in spite of *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503 (1969)(holding that students had a right to wear black armbands in school as a symbolic act).

[4] I note that the Court had difficulty in determining what claims plaintiffs were actually bringing. This is due, in large part, to the fact that plaintiffs lengthy briefs were long on general law concerning privacy rights, but quite short on the facts of this case.

school counselor — for counseling or treatment — without the consent of Mr. & Ms. Newkirk; and (2) that various items in the school curriculum violate their right to privacy.[5]

I will analyze these claims in turn.

Counseling without Consent

Plaintiffs' claim here is plain and simple: their privacy rights were violated because Jason was "counseled" or "treated" by the school counselor, Mr. Fink, without parental consent, or at least without "informed consent." Plaintiffs do not argue that this counseling violating any of their religious beliefs, nor do they tell the Court specifically how this counseling interfered with their "family privacy." They merely assert that it violated their privacy. Moreover, the only statement by plaintiffs describing how this counseling affected Jason's privacy was that he felt "weird and uncomfortable."

I do not believe that plaintiffs have presented adequate evidence to the Count to withstand this motion for summary judgment as to Count I. That is, I find that merely sending a student to counseling without parental consent (or informed

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Also, I note that plaintiffs have made reference to a possible cause of action brought on a fourteenth amendment violation of liberty interests under due process because defendants allegedly violated M.C.L. § 380.1172. This statute, and its corresponding regulations, 1979 M.A.C. § 340.1101, forbid the giving of "personality *tests*" without parental consent. However, the complaint does not allege, nor do any of the facts show, that defendants administered personality tests to Jason Newkirk. Accordingly, this claim is without merit and need not be discussed further by the Court.

[5] I note that plaintiffs vaguely assert that the curriculum violates their right to privacy. However, they do not argue that the curriculum violates any of their religious beliefs.

consent),[6] without more, does not rise to the level of a constitutional violation.[7]

Besides the law cited, *supra*, the Court finds a case from the Eleventh Circuit instructive on this issue. *See, e.g., Arnold v. Board of Education of Escambia County Alabama*, 880 F.2d 305 (11th Cir. 1989). In *Arnold*, a fourteen-year-old student and her parents brought an action against a school district and a number of school district employees ("school defendants") because the school defendants allegedly "coerced"[8] the fourteen-year-old plaintiff, who was pregnant, to have an abortion. The Court found that plaintiffs did state a claim with respect to the

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[6] It is, at best, a debatable issue whether Mr. & Ms. Newkirk did not consent to counseling. However, for purposes of this motion, I assumed that they did not consent.

[7] Although I have found that there is no constitutional violation here, this finding does not preclude a holding by a different court that defendants may have committed a common law tort against plaintiffs. For instance, if a medical professional administers treatment on a patient without consent, or informed consent, that medical professional may be liable under various tort liability theories. *See, e.g., Creech v. Roberts*, 908 F.2d 75 (6th Cir. 1990).

[8] The Court did not define "coercion." Black's Law Dictionary defines "coercion" as:

> Compulsion; constraint; compelling by force or arms or threat. It may be actual, direct, or positive, as where physical force is used to compel act against one's will, or implied, legal or constructive, as where one party is constrained by subjugation to other to do what his free will would refuse. As used in testamentary law, any pressure by which testator's action is restrained against his free will in execution of his testament. "Coercion" that vitiates confession can be mental as well as physical, and question is whether accused was deprived of his free choice to admit, deny, or refuse to answer.

Black's law Dictionary 234 (5th ed. 1979) (citations omitted) (definition of criminal coercion omitted).

coercion issue.[9] However, the Court held that the school defendants had no obligation under any federal statute, rule, regulation or the Constitution, to notify the parents of the fourteen-year-old plaintiff concerning the abortion counseling. *Id.* at 314. In so holding, the Court made the following observations about counseling a student:

> We recognize that parental autonomy to direct the education of one's children is not beyond limitation. When parents enroll their children in public schools they cannot demand that the educational program be tailored to their individual preferences. Instead, a reasonable accommodation must be found by balancing the traditional rights of parents in the rearing of their children and the interest of the state in controlling public schools. While counseling intrudes somewhat on parental control over a child, we acknowledge the important role a guidance counselor plays as a trusted confidant of many students. Counselors possess first amendment rights to free speech and we do not seek to curtail the beneficial use of counseling.

Id. at 313-14.

Similar here, I find that defendants were not under a constitutional obligation to inform Jason's parents that he was being counseled. Certainly, to impose such a requirement would quite frequently not make sense (or, to use the terminology of the court in *Bahr v. Jenkins,* 539 F. Supp. 483 (E.D. Ky. 1982),

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[9] Here, there is no such "coercion" claim, nor is there any evidence that defendants "coerced" Jason into counseling sessions with Mr. Fink. Plaintiffs allege, without any evidentiary support, that Mr. Fink said to Jason, "do not tell your parents," presumably about the counseling sessions. I do not belief that this unsupported factual statement, if true, rises to the level of "coercion" under *Arnold, supra*.

cited *supra*, "common sense"). There are at least three "common sense" reasons for this decision.

First, students often seek counselors because they are having difficulty with their parents. That is to say, the child may be a victim of abuse.[10] It would be antithetical to the public policies established in the area of child abuse law to require disclosure to parents any time a child has seen a school counselor.[11]

Secondly, similar to the reasoning in many of the discipline cases, cited *supra*, a school may deal with a student who is a discipline or other behavioral problem by sending the student to a counselor (in my time, students were sent to the principal). Undoubtedly, a school must be given the authority to deal with children who are disruptive to other students. Unfortunately, there has recently been a severe decline of funding of public education. As a result, teachers are asked to handle very large classes, often in excess of thirty children. If one student in such a large class is being disruptive, then this student is interfering with the educational rights of the other students in his or her class. A teacher does not have the time or resources to deal with a disruptive student. In such a situation, it is not uncommon for the teacher to send the student to a counselor or the principal so that the disruptive student will not interfere with the other students' education. In such an action by a teacher, I do not believe that the Constitution requires parental consent.[12]

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[10] I note that at this point in the proceedings the record reflects no allegations of child abuse.

[11] Moreover, teachers, counselors and other school officials are under an obligation to report child abuse to the Michigan State Department of Social Services. *See* M.C.L. § 722.623.

[12] I note here that there is an allegation that Jason was in fact disruptive in class. As all parties appear to agree, Jason had "difficulty socializing" with the other students. For instance, among other things, he allegedly called another student a "retard" on the playground.

Finally, I note that school counselors are often under a statutory obligation to not reveal the confidences of their relationships with students. *See, e.g.* Ind. Code § 20-6.1-6-15; Idaho Code § 517. While Michigan has not codified a statutory "school counselor-student" privilege, the state does recognize a "psychologist/psychiatrist-patient" privilege. M.C.L. § 330.1750. Certainly, the same principles underlying the psychologist-patient privilege also apply to a school counselor-patient privilege. Such a privilege often cuts against notice to parents concerning the counseling relationships.[13]

In sum, then, I find that plaintiffs have not stated a claim for violation of their privacy rights under the Constitution. Moreover, they have not shown sufficient facts to support such a claim. As I indicated above, plaintiffs have not informed the Court how their privacy rights have been violated. They merely state that because Jason was counseled without their consent, they can maintain a Section 1983 claim. For all the reasons detailed above, I disagree. Certainly, if it is not a violation of privacy to: strip search a student without a warrant or probable cause; go through a student's locker or purse without a warrant or probable cause; beat a student with a paddle without parental consent; or, counsel a student about whether or not to have an abortion, it is not a violation of privacy to counsel a student because s/he is "having trouble socializing" with other students (or is a discipline problem).

Curriculum

Plaintiffs have not specially pled that defendants violated their rights to privacy because of various curricula allegedly utilized in the East Lansing School District. Nonetheless, in going through plaintiffs' numerous exhibits and pleadings, it

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[13] Again, I note that while I have found that plaintiffs have not shown sufficient facts for a constitutional violation, they may have state tort law claim against defendants, such as, among other things, malpractice.

appears that they object to the use of (1) conflict resolution materials in social studies class; and (2) "psychotherapeutic" activities in music class. The so-called "psychotherapeutic" materials in music class were activities known as "Peace, Harmony and Awareness" and "Heart Talk." Defendant Bloomquist, the music teacher, denies using these activities in her class. Plaintiffs have supplied some information on these activities. In sum, as described by plaintiffs, these activities could be construed as "guided imagery" exercises. *See* Plaintiffs' Brief in Response to Killingsworth & Bloomquist Motion for Summary Judgment at 5-7 and Exhibits 15 & 16.

It is clearly established that, when parents educate their children at home, they do not have a fundamental right (to privacy) under the Constitution to educate their children free from government regulation. *Clonlara, Inc. v. Runkel,* 722 F. Supp. 1442, 1457-58 (E.D. Mich. 1989). Thus, when educating their children at home, parents must, among other things, teach certain subjects. Of course, when parents send their children to public school, the parents do not have complete control over the curriculum. Certainly, there are subjects which may be offensive to some families, such as the teaching (or non-teaching) of evolution. *Epperson v. Arkansas,* 393 U.S. 97 (1968). Generally, constitutional challenges to curriculum are made on the basis of religious freedom. In these cases, it is recognized that state schools will be neutral on the subject of religion, neither advocating a particular religious belief nor expressing hostility to any or all religions. *Mozert v. Hawkins County Public Schools,* 582 F. Supp. 201, 202 (E.D. Tenn. 1987). However, the First Amendment "does not guarantee that nothing offensive to any religion will be taught in the schools." *Williams v. Board of Ed. of the County of Kanawha*, 388 F. Supp. 93, 96 (S.D. W. Va. 1975).

Here, plaintiffs have not asserted a religious basis for challenging the curriculum. Instead, they have stated that this

curriculum violates their general rights to privacy. However, plaintiffs have again failed to indicate how these rights were violated, e.g., what is offensive to them about the challenged curriculum — and — what about the curriculum violates their rights to privacy. In other words, plaintiffs have not been very clear.

Plaintiffs have not provided sufficient facts to support their claim on their issue.[14] I do not find, as a matter of constitutional law, that a conflict resolution curriculum in a social studies class or a "guided imagery" exercise in a music class, without more, constitute a prima facie violation of the privacy rights of a family or of a student.

I believe that the following dicta in *Williams v. Board of Education of the County of Kanawha,* 388, F. Supp. 93, 97 (S.D. W. Va 1975) is applicable to this case:

> By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.

For all the reasons stated above, defendants motion to dismiss Count I of plaintiffs' complaint is granted.

Count II - PPRA

Plaintiffs assert a cause of action under the Protection of Pupil Rights Amendment ("PPRA"), 20 U.S.C. § 1232h. This statute provides:

> (a) Inspection by parents or guardians of instructional material,

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[14] Again, I note that plaintiffs did not identify this curriculum challenge issue in their complaint. The Court is reading their pleading very broadly in order to establish this issue.

All instructional material, including teacher's manuals, films, tapes, or other supplementary instructional material which will be used in connection with any research or experimental program or project shall be available for inspection by the parents or guardians of the children engaged in such programs or project. For the purpose of this section "research or experimentation program or project" means any program or project in any applicable program designed to explore or develop new or unproven teaching methods or techniques.

(b) Psychiatric or psychological examinations, testing, or treatment

No student shall be required, as part of any applicable program, to submit to psychiatric examination, testing, or treatment, or psychological examination, testing, or treatment, in which the primary purpose is to reveal information concerning:

(1) political affiliations;

(2) mental and psychological problems potentially embarrassing to the student or his family;

(3) sex behavior and attitudes;

(4) illegal, anti-social, self-incriminating and demeaning behavior;

(5) critical appraisals of other individuals with whom respondents have close family relationships;

(6) legally recognized privileged and analogous relationships, such as those of lawyers, physicians, and ministers; or

> (7) income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such a program), without the prior consent of the student (if the student is an adult or emancipated minor), or in the case of unemancipated minor, without the prior written consent of the parent.

All of the defendants argue that there is no private right of action under this statute. Defendant Fink additionally argues that plaintiffs cannot maintain a § 1983 claim under this statute. The other defendants concede that a § 1983 claim can be maintained on the basis of a violation of this statute.

In order to determine whether there is an implied right of action under a federal statute, congressional intent is of primary importance. *Cabinet for Human Res. v. Northern Ky. Welfare Rights Assoc.*, 954 F.2d 1179, 1181 (6th Cir. 1992) (citations omitted). In *Cort v. Ash*, 422 U.S. 66 (1975), the Supreme Court set forth the following factors to determine if a private right of action is implicit in a federal statute that does not expressly provide for one:

> (1) is the plaintiff one of the class for whose special benefit the statute was enacted — e.g., does the statute create a federal right in favor of the plaintiff?
>
> (2) is there any explicit or implicit indication of legislative intent to either create or deny such a private right of action?
>
> (3) is it consistent with the underlying purposes of the legislative scheme to imply a private right of action for the plaintiff?
>
> (4) is the cause of action one traditionally relegated to state law, as a concern of the states,

> which would make it inappropriate to infer a cause of action based solely on federal law?

Id. at 78 (quoted in *Smith v. Dearborn Financial Services, Inc.*, 982 F.2d 976, 979-80 (6th Cir. 1993)).

The Sixth Circuit has recently pointed out that, in spite of the *Cort* test, the Supreme Court has indicated that "[c]ongressional intent is the dispositive factor in determining whether a private right of action is implicit in a statute."

As all the parties point out, no Court has ever determined whether PPRA provides a private right of action. However, a number of courts have found that the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, a companion statute to PPRA, does not provide for a private right of action. *See, e.g., Fay v. South Colonie Cent. School Dist.*, 802 F.2d 21 (2d Cir. 1986); *Smith v. Duquesne University*, 612 F. Supp. 72 (W.D. Pa. 1985); *Girardier v. Webster College*, 563 F.2d 1267 (8th Cir. 1977). PPRA and FERPA were enacted as a part of a comprehensive education legislative package. Pub. L. No. 90-247 (1974). While PPRA and FERPA are, of course, separate statutory sections, the legislative history behind each provision is very similar — if not identical. To this extent, I find that the decisions interpreting whether a private right of action is available under FERPA can be relied on to determine whether such a right exists under PPRA.

As is pointed out in the decisions interpreting FERPA, it seems clear that, based on the legislative history, enforcement of PPRA is solely in the hands of the Department of Education. *See Girardier*, 563 F.2d at 1276-77; 34 C.F.R. § 98.1 *et seq.* Thus, where, as here, a statutory complaint mechanism and a comprehensive set of administrative remedies are in place, no private cause of action arises under PPRA. Moreover, as defendants point out, there is no evidence from the statute itself, or from any legislative history

that Congress intended to create a private cause of action under PPRA.[15]

Accordingly, I find that no private right of action exists under 20 U.S.C. § 1232h.

The next question — and the more difficult one — is whether plaintiffs can maintain a § 1983 action on the basis of 20 U.S.C. § 1232h. Prior to the Supreme Court's decision in *Suter v. Artist M.*, 118 L. Ed. 2d 1 (1992), the answer to this question was fairly clear. However, *Suter* has "muddied" the waters. Because *Suter* was decided approximately around (or slightly after) the time when defendants' motions for summary judgment were filed, with the exception of defendant Fink, the parties did not thoroughly brief the effect of *Suter* on this case. I am confident that other courts (as well as commentators in law review articles) have had opportunity to address the effect of *Suter*. Therefore, I will ask the parties to submit briefs *on the sole issue* whether plaintiffs can maintain a § 1983 action on the basis of an alleged violation of 20 U.S.C. § 1232h in light of *Suter v. Artist M.*, 118 L. Ed. 2d 1 (1992).[16] Because defendants originally brought these motions for summary judgment, I will ask that they file their supplemental briefs no later than April 23, 1993. Plaintiffs shall respond to defendants' supplemental motions by May 14, 1993. I am confident that the briefs on this issue need not exceed 10 pages.

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[15] In fact, there is evidence in support of the opposite conclusion. As a part of the introduction of the omnibus education bill (which included both PPRA and FERPA), the sponsors of the legislation stated that: "The Secretary of Health, Education and Welfare is charged with enforcement of the provisions of the Act, and failure to comply with its provisions can lead to withdrawal of Office of Education assistance to the educational agency or institution." 120 Cong. Rec. 21,487 (December 13, 1974).

[16] It would also be helpful if the parties would address the question whether, if the Court finds that plaintiffs may bring a § 1983 action on the basis of 20 U.S.C. § 1232h, defendants are entitled to qualified immunity with respect to count II.

Finally, I note that all of the defendants except Mr. Fink have filed a motion entitled, "Objection to Future Filing of Responsive Briefs to Defendants' Motions for Summary Judgment." This objection brings to the Court's attention the fact that plaintiffs have been quite delinquent in filing their responses to defendants' motions for summary judgment. Essentially, this objection is a motion to strike.

In reviewing the docket sheet, defendants are correct in pointing out plaintiffs' casual approach in responding to defendants' motions. In fact, the quickest filing of plaintiffs in response to a defendant's motion to dismiss was slightly over two months. The largest delay was nearly four months! In the event that plaintiffs' attorney has lost his copy of the local rules of the Western District of Michigan, I would like to remind him that Rule 29 requires a response to dispositive motions within twenty-eight (28) days after service of the motion. Such egregious violations of the local rules in the future will result in sanctions from this Court including, but not limited to, monetary fines and, possibly, a decision to strike plaintiffs' pleadings.

DATED in Kalamazoo, MI:
March 31, 1993

/s/ Richard A. Enslen
RICHARD A. ENSLEN
U.S. District Judge

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

JASON NEWKIRK,
by Next Friends, Daniel
Newkirk and Nancy Newkirk;
DANIEL NEWKIRK;
and
NANCY NEWKIRK

Plaintiffs,

v

EAST LANSING PUBLIC SCHOOLS;
DR. WILLIAM MITCHELL; individually and in his
official capacity as the Superintendent for Instruction;
SALLY McCLINTOCK, Individually and in her official
capacity as the Principal of Whitehills Elementary School;
JACKIE KILLINGSWORTH, individually
and in her official capacity as a teacher;
ANN BLOOMQUIST, individually and in her official
capacity as music teacher at Whitehills Elementary School;
MICHAEL FINK, individually and in his official capacity
as Counselor of East Lansing Public Schools;
CREATIVE THERAPEUTIC, INC.,
a New Jersey Corporation
and
DR. RICHARD GARDNER, individually,

Defendants.

File No. 1:91:CV:563
HON. RICHARD A. ENSLEN

ORDER and PARTIAL JUDGMENT

In accordance with the Opinion entered this date;

IT IS HEREBY ORDERED that defendants' motion for partial summary judgment, filed December 18, 1991 (dkt. #17), is **GRANTED in part** and **DEFERRED in part** until such time as the parties have briefed the issue indicated by the Court (e.g., the effect of *Suter v. Artist M.*, 118 L. Ed. 2d 1 (1992));

IT IS FURTHER ORDERED that defendant's motion for summary judgment, filed June 2, 1992 (dkt. #27), is **GRANTED in part** and **DEFERRED in part** until such time as the parties have briefed the issue indicated by the Court (e.g., the effect of *Suter v. Artist M.*, 118 L. Ed. 2d 1 (1992));

IT IS FURTHER ORDERED that defendants' motion for summary judgment, filed July 14, 1992 (dkt. #28), is **GRANTED**;

IT IS FURTHER ORDERED that defendants' motion for summary judgment, filed July 15, 1992 (dkt. #29), is **GRANTED**;

IT IS FURTHER ORDERED that **JUDGMENT is GRANTED** in favor of all defendants and against all plaintiffs with respect to Count I of plaintiffs' complaint;

IT IS FURTHER ORDERED that defendants shall file a supplemental brief in support of their motion for summary judgment addressing the question posed by the Court on or before 5:00 p.m. April 23, 1993;

IT IS FURTHER ORDERED that plaintiffs shall file a response to defendants' supplemental brief(s) in support of their motion for summary judgment on or before 5:00 p.m., May 14, 1993. Defendants may file a reply on or before 5:00 p.m., May 24, 1993;

IT IS FURTHER ORDERED that all motions and briefs be filed with the Clerk of the Court at 410 West Michigan in Kalamazoo, Michigan. Facsimile filings are not permitted.

DATED in Kalamazoo, MI
March 31, 1993

/s/ Richard A. Enslen
RICHARD A. ENSLEN
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

JASON NEWKIRK,
by Next Friends,Daniel
Newkirk and Nancy Newkirk
DANIEL NEWKIRK;
and
NANCY NEWKIRK,

Plaintiffs,

v

EAST LANSING PUBLIC SCHOOLS;
DR. WILLIAM MITCHELL, individually and in his
official capacity as the Superintendent for Instruction;
SALLY McCLINTOCK, individually and in her official
capacity as the Principal of Whitehills Elementary School;
JACKIE KILLINGSWORTH, individually
and in her official capacity as a teacher;
ANN BLOOMQUIST, individually and in her official
capacity as music teacher at Whitehills Elementary School;
MICHAEL FINK, individually and in his official capacity
as Counselor of East Lansing Public Schools;
CREATIVE THERAPEUTICS, INC.,
a New Jersey Corporation;
and
DR. RICHARD GARDNER, individually,

Defendants.

[Filed]
August 19, 1993, 1:51 p.m.
Clerk, U.S. Dist. Court
Western District of Mich.

FILE NO. 1:91:CV:563
HON. RICHARD A. ENSLEN

OPINION

This matter is before the Court on two summary judgment motions, one filed by remaining defendants other than Mr. Fink on December 18, 1991, and the other filed by defendant Fink on June 2, 1992. On March 31, 1993, this Court granted partial summary judgment in favor of defendants, including the dismissal of Count I, the Constitutional claim, against all defendants. This Court deferred ruling on Count II and ordered supplemental briefs on the issue of whether an action could be maintained through 42 U.S.C. § 1983 for the alleged violation of the Protection of Pupil Rights Amendment ("PPRA"), 20 U.S.C. § 1232h, in light of the recent decision in *Suter v. Artist M.*, 118 L. Ed. 2d 1 (1992).

In addition to alleging a violations of the Constitution and of the PPRA, the underlying complaint also alleged pendent state law claims, Counts III through VI. This Court dismissed the state law claims without prejudice on July 29, 1991, holding that they substantially predominated over the federal. Therefore, the only claim remaining before the Court is whether a § 1983 cause of action can be maintained by these plaintiffs for alleged violations of the PPRA.

Facts

According to the complaint, the relevant facts are as follows.[1] In October 1989, defendant Jackie Killingsworth, a third grade teacher at Whitehills elementary school in East Lansing, Michigan, telephoned plaintiff Nancy Newkirk, about Ms.

[1] Because this motion for summary judgment is brought by defendants, I will detail the facts from plaintiffs complaint (rather than from any of the defendants' pleading) in large part because the summary judgment standard requires that I view the facts in a light most favorable to the non-moving party. *See, e.g., Matsushita Electric Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)), *quoted in Historic Preservation Guild v. Burnley*, 896 F.2d 985, 993 (6th Cir. 1989).

Newkirk's son, plaintiff Jason Newkirk. Ms. Killingsworth informed Ms: Newkirk that she (Ms. Killingsworth) was having Jason see defendant Michael Fink, a counselor at Whitehills. Apparently, Jason was having difficulty interacting with the other children his age. Observing this fact, Ms. Killingsworth believed that Jason "needed a friend." After the discussion between Ms. Killingsworth and Ms. Newkirk, Ms. Newkirk consented to having Jason see Mr. Fink, specifically so that Mr. Fink could "play games" with Jason. Ms. Newkirk allegedly "made it clear" that she did not want Mr. Fink counseling Jason.

Shortly thereafter, Ms. Killingsworth filled out a "Referral to child guidance consultant" form on or about November 3, 1989. Sometime later that month, Mr. Fink allegedly talked to plaintiff Daniel Newkirk concerning Jason's difficulties, e.g., failure to socialize with other children. In this conversation, Mr. Fink indicated that he should counsel Jason. Mr. Newkirk refused to give permission to Mr. Fink to counsel Jason. Apparently, parental consent was never given to Mr. Fink by Mr. or Ms. Newkirk to counsel Jason.

In or about January 1990, Mr. Fink allegedly began counseling Jason. At the same time that these counseling sessions began, Jason began to show signs of separation anxiety disorder. Additionally, Jason allegedly began suffering from panic attacks. In June of 1990, Mr. & Ms. Newkirk discovered that Mr. Fink was counseling Jason.[2] The Newkirks asked Mr. Fink what sort of counseling he engaged in with their son. They received some of this information and sent it to defendants William Mitchell (Superintendent of East Lansing Schools) and Sally McClintock (Principal at Whitehills). For the most part, however, plaintiffs argue that they were denied access to Jason's

---

[2] Apparently, Jason informed his parents that he felt "weird and uncomfortable" when talking with Mr. Fink.

counseling material by defendants Mitchell, McClintock and Fink.

Finally, plaintiffs allege that defendant Ann Bloomquist, a music teacher at Whitehills, utilized "psychotherapeutic materials" on Jason Newkirk without the "informed consent" of Mr. & Ms. Newkirk. Moreover, plaintiffs assert that "psychotherapeutic and quasi-psychotherapeutic" activities are "prevalent" in the East Lansing Public Schools. In particular, plaintiffs indicate that a "conflict resolution" curriculum is utilized in a social studies class at Whitehills. Plaintiffs never consented to this curriculum — nor were they able to exclude Jason from this curriculum.

As a result of the counseling by Mr. Fink, the use of "psychotherapeutic" material by Ms. Bloomquist, as well as the utilization of conflict resolution curriculum at Whitehills school, Jason has allegedly suffered "severe and grievous injuries, disabilities and damages resulting in disruption of the Plaintiff parents' home...." Plaintiffs' Complaint ¶ 44.

Standard

A motion for summary judgment requires this Court to view " 'inferences to be drawn from the underlying facts ... in the light most favorable to the party opposing the motion.' " *Matsushita Electric Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)), *quoted in Historic Preservation Guild v. Burnley*, 896 F.2d 985, 993 (6th Cir. 1989). On the other hand, the opponent has the burden to show that a "rational trier of fact [could] find for the non-moving party [or] that there is a '*genuine issue for trial.*' " *Historic Preservation*, 896 F.2d at 993 (quoting *Matsushita*, 475 U.S. 587).

As the Sixth Circuit has recognized and consistently emphasized, recent Supreme Court decisions encourage the granting of summary judgments where there are no material facts in

dispute. *Historic Preservation,* 896 F.2d at 993 (citing *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986)). The courts have noted that the summary judgment motion may be an "appropriate avenue for the 'just, speedy and inexpensive determination' of a matter." *Cloverdale Equipment Co. v. Simon Aerials, Inc.,* 869 F.2d 934, 937 (6th Cir. 1989) (quoting *Celotex,* 477 U.S. at 327). Consistent with the concern for judicial economy, "the mere existence of a scintilla of evidence in support of the [non-moving party's] positions will be insufficient." *Anderson,*, 477 U.S. at 252. "Mere allegations do not suffice." *Cloverdale,* 869 F.2d at 937. "[T]he party with the burden of proof at trial is obligated to provide concrete evidence supporting its claims and establishing the existence of a genuine issue of fact." *Id.*

Discussion

Count II - PPRA

Plaintiffs seek to maintain an action through 42 U.S.C. § 1983 for alleged violations of the Protection of Pupil Rights Amendment ("PPRA"), 20 U.S.C. § 1232h. This statute provides:

> **(a) Inspection by parents or guardians of instructional material**
>
> All instructional material, including teacher's manuals, films, tapes, or other supplementary instructional material which will be used in connection with any research or experimental program or project shall be available for inspection by the parents or guardians of the children engaged in such programs or project. For the purpose of this section "research or experimentation program or project" means any program or project in any applicable program

designed to explore or develop new or unproven teaching methods or techniques.

(b) Psychiatric or psychological examinations, testing, or treatment

No student shall be required, as part of any applicable program, to submit to psychiatric examination, testing, or treatment, or psychological examination, testing, or treatment, in which the primary purpose is to reveal information concerning:

(1) political affiliations;

(2) mental and psychological problems potentially embarrassing to the student or his family;

(3) sex behavior and attitudes;

(4) illegal, anti-social, self-incriminating and demeaning behavior;

(5) critical appraisals of other individuals with whom respondents have close family relationships;

(6) legally recognized privileged and analogous relationships, such as those of lawyers, physicians, and ministers; or

(7) income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such a program), without the prior consent of the student (if the student is an adult or emancipated minor), or in the case of unemancipated minor, without the prior written consent of the parent.

This Court, in its opinion of March 31, 1993, determined that there is no private right of action under this statute. The question remaining before the Court is whether plaintiffs can

utilize § 1983 to privately enforce the alleged violation of the PPRA.

Standard for § 1983 enforcement of a federal statute

Section 1983 is available as a remedy for certain violations of federal statutes as well as for Constitutional violations. *Maine v. Thiboutot,* 448 U.S. 1 (1980).[3] However, the section "is not available to enforce a violation of a federal statute 'where Congress has foreclosed such enforcement of the statute in the enactment itself and where the statute did not create enforceable rights, privileges, or immunities within the meaning of § 1983.' " *Suter,* 118 L. Ed. 2d, at 11 (quoting *Wright v. Roanoke Redevelopment and Housing Authority,* 479 U.S. 418, 423 (1987)).

Prior to *Suter,* the Supreme Court established a three-part test to determine if a statute created a federally enforceable right, privilege or immunity. *Wilder v. Virginia Hospital Ass'n,* 496 U.S. 498, 509 (1990). The initial inquiry, which is vital to the resolution of this case, is whether the provision was intended to benefit the putative plaintiffs. *Id.* If so, then two more barriers must be hurdled: 1) did the provision merely reflect a congressional preference for a certain kind of conduct rather than a binding obligation on the governmental unit; and 2) is the interest or right asserted too vague and amorphous such that it is beyond the competence of the judiciary to enforce? *Id.* (citing *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 19 (1981) and *Golden State Transit Corp. v. Los Angeles,* 493 U.S. 103, 106 (1989)).

Even if the statute creates a right, privilege or immunity otherwise enforceable under § 1983, Congress must not have

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[3] 42 U.S.C. § 1983 states as follows: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress. . . ."

"foreclosed such enforcement of the statute in the enactment itself." *Id.* at 508 (quoting *Wright v. Roanoke Redevelopment and Housing Authority,* 479 U.S. 418, 423 (1987)). The statute itself must include a remedial scheme "sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under § 1983." *Id.* at 521 (quoting *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n,* 453 U.S. 1, 20 (1981)).

The Supreme Court in *Suter* went on to add one more barrier to the use of § 1983 for redressing violations of federal statutes: "did Congress . . . unambiguously confer upon the . . . beneficiaries of the Act a right to enforce the requirement [placed upon the State]." *Suter*, 118 L. Ed. 2d, at 12.

The *Suter* court did not expressly overrule *Wilder. Id.* Instead, it distinguished the "reasonable rates" requirement involved in *Wilder* from the "reasonable efforts" requirement involved in its own facts, and interpreted the latter to mean that Congress was leaving a "great deal of discretion" to the states. *Id.* at 13-16. The *Suter* court also stressed the importance of the existence of an administrative enforcement scheme in finding that the denial a private right of action would not make the "reasonable efforts" clause a "dead letter." It factored in this reasoning in concluding that Congress did not unambiguously intend to confer a private right to enforce the clause through § 1983. *Id.*

Plaintiffs' right under the PPRA and § 1983

The parties have provided no cases interpreting the PPRA, and this Court has found none. In interpreting a statute, the "starting point . . . is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980).

The PPRA provides for making instructional materials available to parents if their children are engaged in any research or experimentation program or project, meaning "any program or project in any *applicable program* designed to explore or develop new or unproven teaching methods or techniques." 20 U.S.C.A. § 1232h(a) (emphasis added). The only possible beneficiaries of this portion of the statute are parents with children participating in a program addressed by this provision.

Plaintiffs have not alleged or provided any facts indicating that the "counseling" and other programs to which Jason Newkirk was subjected were designed to "explore or develop new or unproven teaching methods or techniques." Furthermore, plaintiffs have not alleged or provided any facts to support treating the "counseling" or other programs in which Jason Newkirk participated as "applicable programs" subject to the requirements of the statute.

According to the General Education Provisions Act, 20 U.S.C. § 1221-1234i, of which the PPRA is a part, an applicable program is a "program for which an administrative head of an executive agency has administrative responsibility as provided by law or by delegation of authority pursuant to law." 20 U.S.C.A. § 1221(b).[4]

For defendant Fink's or any other program involving Jason to be covered by § 1232h(a) or (b), it must be a program for which an administrative head of an education agency has administrative responsibility. No allegations or facts have been provided to suggest that the specific programs at issue were in any way subject to federal administrative responsibility, such as

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[4] 20 U.S.C.A. § 1221(c) states as follows: (1) for the purposes of this title, the term—

(A) "applicable program" means any program to which this title, is, under the terms of subjection (b), applicable;

would be the case if the activities were part of a federally funded project.

Plaintiffs complain that psychotherapeutic programs are "pervasive" in East Lansing schools, however, they make no assertions as to how the federal government is connected specifically to such programs, except for the fact that the school system accepts federal funds generally. This interpretation is too broad as the statute refers specifically to "programs," rather than to entities that receive federal funds.

Accordingly, the Plaintiffs have not alleged or provided facts supporting their contention that they are intended beneficiaries of informational requirements in subsection (a) of the PPRA. Therefore, under either the *Wilder* test or the reasoning in *Suter,* section 1983 provides no vehicle for them to seek to enforce alleged violations of subsection (a).

Subsection (b) of the PPRA, popularly known as the Hatch Amendment, states that no student shall be required, *as part of any applicable program*, to submit to psychiatric or psychological examinations, testing, or treatment, in which the *primary purpose* is to reveal information concerning seven expressed categories. 20 U.S.C.A. § 1232h(b) (emphasis added).

Plaintiffs have not alleged and have provided no facts to support a contention that the primary purpose of the sessions with defendant Fink was to reveal information concerning the seven categories. The facts provided by all parties instead demonstrate that the efforts of defendant Fink and others were primarily to counsel and help Jason Newkirk, and that the information sought was incidental to that "primary purpose."

Plaintiffs stated in their complaint that defendant Fink was told that plaintiff Jason Newkirk "was not socializing well with other children . . . ." ¶ 23. Also, the complaint states that defendant Fink suggested that he should counsel Jason. ¶ 24.

In their answers to interrogatories, plaintiffs stated that they "were never given a clear understanding of the risks and benefits of the proposed treatment alternatives or non-treatment, or a full understanding of the nature of the disease and the prognosis." Exhibit 1, page 3, to Plaintiffs' brief in opposition to defendants' East Lansing Public Schools, Mitchell and McClintock's motion for summary judgment. Plaintiffs also stated in the interrogatories that "[t]he information so gained served as a point of departure for psychotherapeutic interaction." Exhibit 1, *supra*, page 8.

Plaintiffs' allegations and responses to interrogatories evidence their recognition that the *primary purposes* of defendant Fink's questions, games, and interaction with Jason were to counsel him and improve his ability to socialize. The information sought by defendant Fink from Jason was secondary to the purpose of counseling him.

Only persons who are subjected to testing or treatment for the primary purpose of revealing information in the seven specified categories could be considered "intended beneficiaries" of subsection (b). Because no allegation or facts have been produced suggesting that defendant Fink's activities were primarily intended to obtain the specified category of information, rather than as a tool for counseling and helping Jason, plaintiffs are not among the class of persons intended to be protected by subsection (b) of the PPRA.

Also, as noted above, there is no contention that the "programs" in which Jason Newkirk participated were "applicable programs" under the federal statute. Consequently, plaintiffs were not intended beneficiaries of the PPRA and cannot use § 1983 as a vehicle to enforce alleged violations of the statute.

Because of the above disposition of the § 1983 action concerning the PPRA, this Court need not determine whether *Suter* and its progeny would prevent using § 1983 to vindicate possible rights secured under the PPRA. Whether there are

enforceable rights for private action and, if so, whether Congress intended to foreclose private enforcement of those rights through the use of an administrative process remain open questions.

Under *Suter* and *Wilder,* plaintiffs are not within the class of intended beneficiaries of the PPRA and cannot use § 1983 as vehicle to enforce their claim against defendants. Accordingly, judgment will be entered in favor of defendants as to the federal claims in plaintiffs' suit, and plaintiffs' action is dismissed.

DATED: August 16, 1993

/s/Richard A. Enslen
Richard A. Enslen
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

JASON NEWKIRK,
by Next Friends, Daniel
Newkirk and Nancy Newkirk
DANIEL NEWKIRK;
and
NANCY NEWKIRK,

Plaintiffs,

v

EAST LANSING PUBLIC SCHOOLS;
DR. WILLIAM MITCHELL, individually and in his
official capacity as the Superintendent for Instruction;
SALLY McCLINTOCK, individually and in her official
capacity as the Principal of Whitehills Elementary School;
JACKIE KILLINGSWORTH, individually
and in her official capacity as a teacher;
ANN BLOOMQUIST, individually and in her official
capacity as music teacher at Whitehills Elementary School;
MICHAEL FINK, individually and in his official capacity
as Counselor of East Lansing Public Schools;
CREATIVE THERAPEUTICS, INC.,
a New Jersey Corporation;
and
DR. RICHARD GARDNER, individually,

Defendants.

[Filed] August 19, 1993, 1:51 p.m.
Clerk, U.S. Dist. Court
Western District of Mich.

File No. 1:91:CV:563
HON. RICHARD A. ENSLEN

JUDGMENT

In accordance with the Opinion entered this date;

IT IS HEREBY ORDERED that defendants' motion for partial summary judgment, filed December 18, 1991 (dkt. #17), is **GRANTED**;

IT IS FURTHER ORDERED that defendant's motion for summary judgment, filed June 2, 1992 (dkt. #27), is **GRANTED;**

IT IS FURTHER ORDERED that **COUNT II** of plaintiffs' complaint is **DISMISSED** with Prejudice;

IT IS FURTHER ORDERED that **JUDGMENT** is **GRANTED** in favor of all defendants and against all plaintiffs as to **COUNT II** of plaintiffs' complaint.

DATED: August 16, 1993

/s/ Richard A. Enslen
Richard A. Enslen
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

JASON NEWKIRK,
by Next Friends, Daniel
Newkirk and Nancy Newkirk;
DANIEL NEWKIRK;
and
NANCY NEWKIRK;

Plaintiffs,

v.

EAST LANSING PUBLIC SCHOOLS;
DR. WILLIAM MITCHELL; individually and in his
official capacity as the Superintendent for Instruction;
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JACKIE KILLINGSWORTH, individually
and in her official capacity as a teacher;
ANN BLOOMQUIST, individually and in her official
capacity as music teacher at Whitehills Elementary School;
MICHAEL FINK, individually and in his official capacity as
Counselor of East Lansing Public Schools;
CREATIVE THERAPEUTICS, INC.,
a New Jersey Corporation;
and
DR. RICHARD GARDNER, individually,

Defendants.

1988 December 16 P.M. 4:23
Clerk U.S. District Court
Western Dist. of Mich.

File No. 1:91:CV:563
HON. RICHARD A. ENSLEN

OPINION

This matter is before the Court on plaintiff's motion to alter or amend judgment, concerning this Court's grant of summary judgment in favor of defendants.

On March 31, 1993, this Court granted summary judgment on Count I of the complaint, but reserved deciding on Count II until the effect of a recent decision by the Supreme Court, *Suter v. Artist M.*, 118 L. Ed. 2d 1 (1992), could be briefed by the parties. On August 19, 1993, this Court granted summary judgment to defendants on Count II, but it was based upon grounds other than the application of *Suter.* Final judgment in this case was also entered on August 19, 1993, dismissing plaintiffs' case.

Plaintiffs request this Court to alter or amend both of its summary judgment orders.

DISCUSSION

Rule 59(e) of the Federal Rules of Civil Procedure provides that motions to alter or amend judgments can be made within 10 days after the entry of judgment.

This rule may properly by invoked to request the trial court to "reconsider, vacate or even reverse its prior holding," including to rescind a prior grant of summary judgment. *National Metal Finishing Co. v. Barclays American/Commercial Inc.*,899 F.2d 119, 123-24 (1st Cir. 1990). "There are only three possible grounds for any motion for reconsideration under Rule 59(e): "(1) an intervening change in the law; (2) the availability of new evidence not previously available; and (3) the need to correct a clear error of law or prevent manifest injustice." *Atkins v. Marathon LeTourneau Co.*, 130 F.R.D. 625, 626 (S.D. Miss. 1990).

"Appropriate circumstances for a motion to reconsider are where the court has obviously misapprehended a party's position, the facts or the law, or mistakenly has decided issues

outside of those the parties presented for determination." *Foutty v. Equifax Services, Inc.*, 764 F. Supp. 621, 622 (D.Kan. 1991).

Rule 59(e) "does not allow the losing party to repeat old arguments previously considered and rejected, or to raise new legal theories that should have been raised earlier." *National Metal Finishing.* 899 F.2d at 123.

March 31, 1993 Grant of Summary Judgment

Defendants urge this Court to find that the time for plaintiffs to file their motion to amend the judgment ran from March 31, 1993, as to the issues decided in that opinion and order, arguing that because the motion was not filed within ten days, it was untimely.

The cases provided by defendants in support of their position do not address the Rule 59(3) issues involved here, where part of a summary judgment motion was decided in March and the remainder was decided in August following further briefing. The Court sees no authority for not considering the motion as timely, as final judgment did not occur until August, and defendants have acknowledged that, as to that date, the motion was timely.

Nevertheless, the Court declines to reconsider or alter its Opinion and Order of March 31, 1993. The Court finds that as to that Opinion, plaintiffs are simply trying to reargue positions that Court rejected or are attempting new arguments that should have been raised earlier. Finally, the Court finds that there was no clear error in its original Opinion.

August 19, 1993 Grant of Summary Judgment

Although I believe that reopening the issue of the possible liability of defendants for alleged violations of the Protection of Pupil Rights Amendment ("PPRA"), 20 U.S.C. § 1232h, may ultimately prove to be a waste of everyone's time and money, I believe that plaintiffs are correct in their assertion that this Court

improperly addressed an issue that was not clearly before it and was not ripe for decision.

This Court found a lack of evidence to support liability under the Act or the applicability of the Act to defendants conduct. Because of the voluminous materials provided for review with the briefs in support and in opposition to summary judgment, the fact that discovery had been stayed since December 9, 1992 was overlooked. Plaintiffs should have the opportunity to discover whether there is sufficient evidence to support the PPRA claims. Accordingly, the Opinion issued on August 19, 1993, is reconsidered below, limiting the decision to the issue that was specifically briefed.

Facts

According to the complaint, the relevant facts are as follows.[1] In October 1989, defendant Jackie Killingsworth, a third grade teacher at Whitehills Elementary School in East Lansing, Michigan, telephoned plaintiff Nancy Newkirk, about Ms. Newkirk's son, plaintiff Jason Newkirk. Ms Killingsworth informed Ms. Newkirk that she (Ms. Killingsworth) was having Jason see defendant Michael Fink, a counselor at Whitehills. Apparently, Jason was having difficulty interacting with the other children his age. Observing this fact, Ms. Killingsworth believed that Jason "needed a friend." After the discussion between Ms. Killingsworth and Ms. Newkirk, Ms. Newkirk consented to having Jason see Mr. Fink, specifically so that

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[1] Because this motion for summary judgment is brought by defendants, I will detail the facts from plaintiffs complaint (rather than from any of the defendants' pleadings) in large part because the summary judgment standard requires that I view the facts in a light most favorable to the non-moving party. *See, e.g., Matsushita Electric Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *United States v. Diebold, Inc.* 369 U.S. 654, 655 (1962)), *quoted in Historic Preservation Guild v. Burnley*, 896 F.2d 985, 993 (6th cir. 1989).

Mr.Fink could "play games" with Jason. Ms. Newkirk allegedly "made it clear" that she did not want Mr. Fink counseling Jason.

Shortly thereafter, Ms. Killingsworth filled out a "Referral to child guidance consultant" form on or about November 3, 1989. Sometime later that month, Mr. Fink allegedly talked to plaintiff Daniel Newkirk concerning Jason's difficulties, e.g., failure to socialize with other children. In this conversation, Mr. Fink indicated that he should counsel Jason. Mr. Newkirk refused to give permission to Mr. Fink to counsel Jason. Apparently, parental consent was never given to Mr. Fink by Mr. or Ms. Newkirk to counsel Jason.

In or about January 1990, Mr. Fink allegedly began counseling Jason. At the same time that these alleged counseling sessions began, Jason began to show signs of separation anxiety disorder. Additionally, Jason allegedly began suffering from panic attacks. In June of 1990, Mr. and Ms. Newkirk discovered that Mr. Fink was counseling Jason.[2] The Newkirks asked Mr. Fink what sort of counseling he engaged in with their son. They received some of this information and sent it to defendants William Mitchell (Superintendent of East Lansing Schools) and Sally McClintock (Principal at Whitehills). For the most part, however, plaintiffs argue that they were denied access to Jason's counseling material by defendants Mitchell, McClintock and Fink.

Finally, plaintiffs allege that defendant Ann Bloomquist, a music teacher at Whitehills, utilized "psychotherapeutic materials" on Jason Newkirk without the "informed consent" of Mr. and Ms. Newkirk. Moreover, plaintiffs assert that "psychotherapeutic and quasi-psychotherapeutic" activities are "prevalent" in the East Lansing Public Schools. In particular, plaintiffs indicate that a "conflict resolution" curriculum is utilized in a

---

[2] Apparently, Jason informed his parents that he felt "weird and uncomfortable" when talking with Mr. Fink.

social studies class at Whitehalls. Plaintiffs state they never consented to this curriculum — nor were they able to exclude Jason from this curriculum.

As a result of the counseling by Mr. Fink, the use of "psychotherapeutic" material by Ms. Bloomquist, as well as the utilization of conflict resolution curriculum at Whitehills school, Jason has allegedly suffered "severe and grievous injuries, disabilities and damages resulting in a disruption of the Plaintiff parents' home . . . . " Plaintiffs' Complaint ¶ 44.

Standard

A motion for summary judgment requires this Court to view " 'inferences to be drawn from the underlying facts . . . in the light most favorable to the party opposing the motion.' " *Matsushita Electric Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)), *quoted in Historic Preservation Guild v. Burnley*, 896 F.2d 985, 993 (6th Cir. 1989). On the other hand, the opponent has the burden to show that a "rational trier of fact [could] find for the non-moving party [or] that there is a 'genuine issue for trial.' ". *Historic Preservation,* 896 F.2d at 933 (quoting *Matsushita*, 475 U.S. 587).

As the Sixth Circuit has recognized and consistently emphasized, recent Supreme Court decisions encourage the granting of summary judgments where there are no material facts in dispute. *Historic Preservation,* 896 F.2d at 993 (citing *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986)). The courts have noted that the summary judgment motion may be an "appropriate avenue for the 'just, speedy and inexpensive determination' of a matter." *Cloverdale Equipment Co. v. Simon Aerials, Inc.,* 869 F.2d 934, 937 (6th Cir. 1989) (quoting *Celotex,* 477 U.S. at 327). Consistent with the concern for judicial economy, "the mere existence of a scintilla of evidence in support of the [non-moving party's]

positions will be insufficient." *Anderson*, 477 U.S. at 252. "Mere allegations do not suffice." *Cloverdale*, 869 F.2d at 937. "[T]he party with the burden of proof at trial is obligated to provide concrete evidence supporting its claims and establishing the existence of a genuine issue of fact." *Id.*

Section 1983 private action to enforce the PPRA

Plaintiffs seek to maintain an action through 42 U.S.C. § 1983 for alleged violations of the Protection of Pupil Rights Amendment ("PPRA"), 20 U.S.C. 1232h. This statute provides:

> **(a) Inspection by parents or guardians of instructional material**
>
> All instructional material, including teacher's manuals, films, tapes, or other supplementary instructional material which will be used in connection with any research or experimental program or project shall be available for inspection by the parents or guardians of the children engaged in such programs or project. For the purpose of this section "research or experimentation program or project" means any programs or project in any applicable program designed to explore or develop new or unproven teaching methods or techniques.
>
> **(b) Psychiatric or psychological examinations, testing, or treatment**
>
> No student shall be required, as part of any applicable program, to submit to psychiatric examination, testing, or treatment, or psychological examination, testing, or treatment, in which the primary purpose is to reveal information concerning:
>
> (1) political affiliations;

(2) mental and psychological problems potentially embarrassing to the student or his family;

(3) sex behavior and attitudes;

(4) illegal, anti-social, self-incriminating and demeaning behavior;

(5) critical appraisals of other individuals with whom respondents have close family relationships;

(6) legally recognized privileged and analogous relationships, such as those of lawyers, physicians, and ministers; or

(7) income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such a program), without the prior consent of the student (if the student is an adult or emancipated minor), or in the case of unemancipated minor, without the prior written consent of the parent.

Standard for § 1983 enforcement of a federal statute

Section 1983 is available as a remedy for certain violations of federal statutes as well as for Constitutional violations. *Maine v. Thiboutot,* 448 U.S. 1 (1980).[3] However, the section "is not available to enforce a violation of a federal statute 'where Congress has foreclosed such enforcement of the statute in the enactment itself and where the statute did not create enforceable rights, privileges, or immunities within the meaning of § 1983.' "

---

[3] 42 U.S.C. § 1983 states as follows: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . . "

Suter, 118 L. Ed. 2d, at 11 (quoting *Wright v. Roanoke Redvelopment and Housing Authority*, 479 U.S. 418, 423 (1987)).

Prior to *Suter*, the Supreme Court established a three-part test to determine if a statute created a federally enforceable right, privilege or immunity. *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 509 (1990). The initial inquiry is whether the provision was intended to benefit the putative plaintiffs. *Id.* If so, then two more barriers must be hurdled: 1) did the provision merely reflect a congressional preference for a certain kind of conduct rather than a binding obligation on the governmental unit; and 2) is the interest or right asserted too vague and amorphous such that it is beyond the competence of the judiciary to enforce? *Id.* (citing *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1,19 (1981) and *Golden State Transit Corp. v. Los Angeles*, 493, U.S. 103, 106 (1989)).

Even if the statute creates a right, privilege or immunity otherwise enforceable under section 1983, Congress must not have "foreclosed such enforcement of the statute in the enactment itself." *Id.* at 508 (quoting *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 423 (1987)). The statute itself must include a remedial scheme "sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under §1983." *Id.* at 521 (quoting *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981)).

The Supreme Court in *Suter* went on to add one more barrier to the use of section 1983 for redressing violations of federal statutes: "did Congress . . . unambiguously confer upon the . . . beneficiaries of the Act a right to enforce the requirement [placed upon the State]." *Suter*, 118 L.Ed. 2d, at 12.

The *Suter* court did not expressly overrule *Wilder. Id.* Instead, it distinguished the "reasonable rates" requirement involved in *Wilder* from the "reasonable efforts" requirement involved in its own facts, and interpreted the latter to mean that

Congress was leaving a "great deal of discretion" to the states. *Id.* at 13-16. The *Suter* court also stressed the importance of the existence of an administrative enforcement scheme in finding that the denial a private right of action would not make the "reasonable efforts" clause a "dead letter." It factored in this reasoning in concluding that Congress did not unambiguously intend to confer a private right to enforce the clause through section 1983. *Id.*

Regarding the PPRA: the Hatch Amendment, subsection (b) clearly states that "[n]o student shall be required . . . to submit to [certain testing for a specified primary purpose]." 20 U.S.C. § 1232h (b). Although defendants argue that the overall intent of the act was to place obligations on the Secretary of Health, Education and Welfare (later changed to the Secretary of Education), it seems clear that the expressed language in this provision provided unambiguous rights to private parties not to be subjected to certain testing.

As to who can enforce the rights: defendants refer to the ability of the Secretary to withhold funds for violations and to a detailed regulatory scheme contained in the federal regulations, 34 CFR §§ 98.1-98.10. Plaintiffs correctly respond that the detailed regulatory scheme did not exist until 1984, six years after the Hatch Amendment passed. It seems clear that the statute allowed room for private enforcement of rights at the time it was passed. Although the legislative history of the Amendment is silent on whether there is a private right of action,[4] I believe such a right was implied and unambiguously conferred at the time the Amendment was passed in 1978.

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[4] The failure of the legislative history to address whether there is a private right of action does not preclude a finding that a private right was implied, but to infer such a right on the basis of such silence is a "hazardous enterprise." *Osborn v. A.A.R.P.*, 660 F.2d 740, 745 (9th Cir. 1981). Here, the implication is also based upon the mandatory prohibitive language in the statute and the lack of a comprehensive administrative enforcement mechanism for the statute's first six years in existence.

The Court in *Suter* specifically deferred deciding on whether administrative enforcement schemes, such as exists in the present case, that are not so comprehensive as to leave no room for private enforcement would still preclude the use of section 1983.

I believe that private enforcement through section 1983 is not precluded under *Suter* and is an appropriate means of addressing prohibited testing under the statute.

Defendant Fink raised the issue of the "primary purpose" requirement in the PPRA in his supplemental brief that was supposed to be limited to the effect of *Suter* on the issue of whether a PPRA violation could be privately enforced in a section 1983 action. As noted above, this Court improperly considered this issue as related to the merits of whether there was a violation under the facts of this case. Defendant Fink raised the issue in the context of a qualified immunity argument.

The Court finds that there is a question of fact that is central to the resolution of this issue: was it the primary purpose of defendant Fink or others, in their interactions with Jason Newkirk, to have information revealed. The Court remains highly skeptical about whether this fact will ultimately be proven by plaintiffs. However, if it was, in fact, the primary purpose, the law was clearly established in 20 U.S.C. 1232h in providing that such activities were unlawful. Consequently, no qualified immunity can protect defendants.

Therefore, summary judgment on Count II concerning the PPRA is denied and discovery will be reopened as to Count II.

Motion to Amend Complaint: Previously Unresolved

This Court reviewed the proposed amended complaint in August 1993, and determined that it was directed at constitutional issues and not to the issues the Court was then addressing. Consequently, because this Court prematurely decided to dis-

miss the entire case, the motion was apparently never formally denied.

The motion for leave to file an amended complaint was pursuant to Rule 15 of the Federal Rules of Civil Procedure. The proposed amendment was filed in July 1993, about four months after the constitutional claims in Count I had been adjudged in favor of defendants.

The proposed amended complaint alleges first amendment free exercise clause violations and fourteenth amendment due process violations. Because of the timing of the Court's premature dismissal of this action, plaintiffs never had the opportunity to respond to the arguments set forth by defendants in their briefs opposing the motion to amend the complaint. The Court will therefore postpone ruling upon the motion to amend the complaint until plaintiffs have filed a reply brief.

CONCLUSION

For the foregoing reasons, plaintiffs' motion to alter or amend judgment is granted as to this Court's Opinion and Order of August 19, 1993, but denied as to the Opinion from March 31, 1993. The stay of discovery as to Count II should be lifted. As to the motion to amend the complaint, the Court will defer its ruling until after plaintiffs have filed their reply brief.

DATED in Kalamazoo, MI:
December 16, 1993

/s/ Richard A. Enslen
Richard A. Enslen
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

JASON NEWKIRK,
by Next Friends, Daniel
Newkirk and Nancy Newkirk;
DANIEL NEWKIRK;
and
NANCY NEWKIRK,

Plaintiffs,

v.

EAST LANSING PUBLIC SCHOOLS;
DR. WILLIAM MITCHELL; individually and in his
official capacity as the Superintendent for Instruction;
SALLY McCLINTOCK, Individually and in her official
capacity as the Principal of Whitehills Elementary School;
JACKIE KILLINGSWORTH, individually
and in her official capacity as music teacher
at Whitehills Elementary School;
MICHAEL FINK, individually and in his official capacity
as Counselor of East Lansing Public Schools;
CREATIVE THERAPEUTICS, INC.,
a New Jersey Corporation;
and
DR. RICHARD GARDNER, individually,

Defendants.

1993 December 16, 4:23
Clerk U.S. District Court
Western Dist. of Mich.

File No. 1:91:CV:563
HON. RICHARD A. ENSLEN

ORDER

In accordance with the Opinion entered this date;

IT IS HEREBY ORDERED that plaintiffs' motion to alter or amend judgment, filed September 2, 1993 (dkt. #61) is **GRANTED** in part and **DENIED** in part;

IT IS FURTHER ORDERED that the Order and Opinion granting partial summary judgment issued on March 31, 1993 (dkt. ## 42 and 43) remain unaltered and unamended;

IT IS FURTHER ORDERED that the Opinion and Judgment issued August 19, 1993 (dkt. ## 58 and 59) are **VACATED**;

IT IS FURTHER ORDERED that as to Count II of the original complaint, defendants' motions for summary judgment, filed on December 12, 1991 (dkt. #17), June 2, 1992 (dkt. #27), July 14, 1993 (dkt. #28), July 15, 1992 (dkt. #29) are **DENIED**;

IT IS FURTHER ORDERED that plaintiffs shall file a reply brief on or before 5:00 p.m. on December 30, 1993, to the briefs filed by defendants in response to plaintiffs' motion for leave to file an amended complaint. No facsimile will be accepted.

DATED in Kalamazoo, MI:
December 16, 1993

/s/ Richard A. Enslen
Richard A. Enslen
United States District Judge

D - 1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

JASON NEWKIRK,
by Next Friends, DANIEL
NEWKIRK and NANCY NEWKIRK,
and DANIEL NEWKIRK and NANCY NEWKIRK,

Plaintiffs,

v.

EAST LANSING PUBLIC SCHOOLS;
DR. WILLIAM MITCHELL, individually and in his
official capacity as the Superintendent for Instruction;
SALLY McClintock, individually and in her official
capacity as the Principal of Whitehills Elementary School;
JACKIE KILLINGSWORTH, individually and in her
official capacity as teacher; ANN BLOOMQUIST individually and
in her officialcapacity as music teacher at Whitehills Elementary
School; MICHAEL FINK, individually and in his official capacity
as Counselor of East Lansing Public Schools,

Defendants.

Case No:1:91 CV 563
Hon. Richard A. Enslen

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Richard E. Holmes (P42114)
Ann M. Stuursma (P41412)
Attorneys for Defendants
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Dr. William Mitchell, Sally
McClintock, Jackie Killingsworth,
and Ann Bloomquist
Smith, Haughey, Rice & Roegge
250 Monroe Avenue, N.W.
200 Calder Plaza Building
Grand Rapids, MI 49503
(616) 774-8000

STIPULATION AND ORDER FOR DISMISSAL

NOW COMES East Lansing Public Schools, Dr. William Mitchell, Sally McClintock, Jackie Killingsworth, and Ann Bloomquist, by and through their attorneys Smith, Haughey, Rice & Roegge, to hereby stipulate and agree that the above-captioned cause of action be dismissed, with reference to these Defendants only, with prejudice and without costs to either party.

Dated: March 21, 1994

The Rutherford Institute of Michigan
Attorneys for Plaintiff
By: /s/ David R. Melton
David R. Melton (P38986)

BUSINESS ADDRESS:
4565 Wilson Ave., Ste. 110
Grandville, MI 49418
(616) 538-9300

Date: March 21, 1994

SMITH, HAUGHEY, RICE & ROEGGE
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By:/s/Richard E. Holmes
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Grand Rapids, MI 49503
(616) 774-8000

Dated: March 21, 1994

Thurn, Maatsch & Nordberg
Attorneys for Defendant
Michael Fink

By: /s/ Lisa L. Swem
Lisa L. Swem (P42051)
BUSINESS ADDRESS:
501 S. Capitol Avenue
Suite 500
Lansing, MI 48901
(517) 484-8000

ORDER

At a session of said Court, held in the City of Kalamazoo, County of Kalamazoo, State of Michigan, on this the 28 day of March, 1994.

PRESENT: HON. RICHARD A. ENSLEN

IT IS SO ORDERED

/s/Hon. Richard A. Enslen
Hon. Richard A. Enslen

NOT RECOMMENDED FOR PUBLICATION

NO. 94-1520

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JASON NEWKIRK, by Next Friends Daniel Newkirk and Nancy Newkirk, DANIEL NEWKIRK, and NANCY NEWKIRK,

Plaintiffs-Appellants,

v.

EAST LANSING PUBLIC SCHOOLS, et al.

Defendants

and

MICHAEL FINK, individually and in his official capacity as Counselor of East Lansing Public Schools,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

Filed JUN 13, 1995
LEONARD GREEN, CLERK

NOT RECOMMENDED FOR FULL TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations.
Please see rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
This notice is to be prominently displayed if this decision is reproduced.

BEFORE: NORRIS and DAUGHTREY, Circuit Judges, and CHURCHILL, District Judge.*

*The Honorable James P. Churchill, United States District Judge for the Eastern District of Michigan , sitting by designation.

PER CURIAM. The plaintiffs, a third-grade public school student and his parents, sued Michigan school officials, alleging that they had violated the plaintiffs' constitutional right to privacy and other rights by subjecting the plaintiff student to counseling and psychological testing by a guidance counselor without parental consent. The district court granted summary judgment to all defendants and the plaintiffs appeal the judgment on the right-to-privacy count as to the guidance counselor only. They also allege that the district court erred in refusing to permit the filing of an amended complaint almost four months after the order of summary judgment was entered and two years after the original complaint was filed. We find no error in connection with either ruling and affirm.

Essentially, the district court concluded that plaintiffs' allegation that their privacy rights were violated when young Jason Newkirk was sent to the school counselor for counseling or "treatment," without the consent of his parents, did not state a claim under the Federal Constitution. Further, the district court disallowed amendment of the complaint, finding that there had been "no showing why plaintiffs waited so long to amend the factual basis for the claims in the original complaint," from which the court concluded that the motion to amend was "merely to avoid final summary judgment and not for any legitimate purpose." As to the addition of a new claim based on the Free Exercise Clause, the district court found that such a claim could not withstand a Rule 12(b)(6) motion and that amendment of the complaint would, therefore, be futile.

Having had the benefit of oral argument, and having carefully considered the voluminous record on appeal and the extensive briefs of the parties, we are not persuaded that the district court erred in granting summary judgment to the defendant and, thereafter, disallowing amendment of the complaint.

Because the reasons why judgment should be entered for the defendant have been fully articulated by the district court,

the issuance of a full written opinion by this court would be duplicative and would serve no useful purpose. Accordingly, we AFFIRM the judgment of the district court based on the reasoning set out by that court in its opinions dated March 31, 1993, and January 7, 1994.

SO ORDERED.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

JASON NEWKIRK, et. al.,

Plaintiffs,

v.

EAST LANSING PUBLIC SCHOOLS, et al.,

Defendants.

Case No. 1:91 CV 563

OPINION AND ORDER

A review of the plaintiffs' complaint reveals that it contains pendant state law claims over which the Court does not have original jurisdiction. The Court must decide whether it should exercise its discretion to exert jurisdiction over the state law claims.

Congress has enacted a new provision entitled: Supplemental Jurisdiction, which governs jurisdiction over any "claim so related to the action that it forms part of the same case or controversy under Article III of the United States Constitution." P.L. 101-650. Sec. 306. (amendment to Chapter 85 of Title 28, § 1367) (effective December 1, 1990). This provision states that a court may decline to exercise supplemental jurisdiction if "the claim substantially predominates over the claim or claims over which the district court has original jurisdiction." *Id.* (§ 1367(c)). This language essentially mirrors the language used by the courts in developing the common-law doctrine of pendent jurisdiction. For this reason, application of the law governing pendent jurisdiction is warranted.

A federal district court may exercise pendent jurisdiction over state law claims if it (1) has the authority to hear the claims and (2) determines, in its discretion, that the exercise of juris-

diction over the claims will further the policy goals of the doctrine of pendent jurisdiction. *See generally United Mine Workers v. Gibbs,* 383 U.S. 715 (1966). The Sixth Circuit has summarized the requirements for exerting pendent jurisdiction over state claims as such:

> "The three prerequisites for the exercise of pendent jurisdiction are (1) the federal claim must have substance sufficient to confer subject matter jurisdiction on the court; (2) the state and federal claims must derive from a common nucleus of operative fact; and (3) the plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding."

Gaff v. Federal Deposit Insurance Corp., 814 F.2d 311, 319 (6th Cir. 1987) (quoting *Transcontinental Leasing, Inc. v. Michigan Nat'l Bank,* 738 F.2d 163, 165-66 (6th Cir. 1984)).

The doctrine of pendent jurisdiction is a doctrine of judicial discretion whose justification lies in "considerations of judicial economy, convenience and fairness to litigants." *Gibbs,* 383 U.S. at 726. The Supreme Court has recognized that "a federal court's determination of state-law claims could conflict with the principle of comity to the States and with the promotion of justice between the litigating parties." *Carnegie-Mellon University v. Cohill,* 484 U.S. 343, 349-50 (1988) (quoting *Gibbs* at 726). Thus, "pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." *Gibbs* at 726. Accordingly, a federal court with pendent jurisdiction should normally dismiss state claims without prejudice when it appears that the state issues "substantially predominate" over the federal issues in terms of proof, scope, or comprehensiveness of the remedy sought. *Id.*

Plaintiffs have asserted four claims over which the Court could exercise supplemental or pendent jurisdiction. I find that plaintiffs' state law claims substantially predominate over the federal claims asserted. For this reason, plaintiffs' pendent state

law claims, counts III, IV, V and VI, are hereby DISMISSED without prejudice.

DATED:
July 29, 1991

/s/ Richard A. Enslen
RICHARD A. ENSLEN
U.S. District Judge

Case No. 93-1638

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

JASON NEWKIRK,
by Next Friends, Daniel
Newkirk and Nancy Newkirk
DANIEL NEWKIRK;
and
NANCY NEWKIRK,
Plaintiffs - Appellants

v

EAST LANSING PUBLIC SCHOOLS;
WILLIAM MITCHELL, Dr.,individually and in his
official capacity as the Superintendent for Instruction;
SALLY McCLINTOCK, individually
and in her official capacity
as the Principal of Whitehills Elementary School;
JACKIE KILLINGSWORTH, individually and in her
official capacity as a teacher;
ANN BLOOMQUIST, individually and in her official
capacity as music teacher at Whitehills Elementary School;
MICHAEL FINK, individually and in his official capacity
as Counselor of East Lansing Public Schools;
Defendants - Appellees

CREATIVE THERAPEUTICS, INC.,
New Jersey Corporation;
and
RICHARD GARDNER, DR.
Defendants.

[Filed] May 13, 1993
By: Leonard Green, Clerk
U.S. District Court
Western Michigan
Series No. F03

1:91-CV-563

Upon consideration of the appellant's motion to voluntarily dismiss the appeal herein pursuant to Rule 42(b), Federal Rules of Appellate Procedure,

It is **ORDERED** that the motion be and it hereby is GRANTED and the appeal is dismissed.

A TRUE COPY
Attest:
LEONARD GREEN, CLERK
/S/ J. BROCK
Deputy Clerk

ENTERED PURSUANT TO
RULE 8(b), RULES OF THE
SIXTH CIRCUIT
LEONARD GREEN, CLERK
/S/ LEONARD GREEN, JR.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

JASON NEWKIRK
by Next Friends, Daniel
Newkirk and Nancy Newkirk;
DANIEL NEWKIRK;
and
NANCY NEWKIRK,

Plaintiffs

v

EAST LANSING PUBLIC SCHOOLS:
DR. WILLIAM MITCHELL; individually and in his
official capacity as the Superintendent for Instruction;
SALLY McCLINTOCK, individually and in her official
capacity as the Principal of Whitehills Elementary School;
JACKIE KILLINGSWORTH, individually
and in her official capacity as a teacher;
ANN BLOOMQUIST, individually and in her official
capacity as music teacher at Whitehills Elementary School;
MICHAEL FINK, individually and
in his official capacity
as Counselor of East Lansing Public Schools;
CREATIVE THERAPEUTICS, INC. a
New Jersey Corporation;
and
DR. RICHARD GARDNER, individually,

Defendants.

File No. 1:91:CV:563
HON. RICHARD A. ENSLEN

OPINION

This matter is before the Court on plaintiffs' motion for leave to file an amended complaint, filed July 26, 1993. The proposed amendments allege additional constitutional violations arising out of the same activities that are the basis for the initial complaint. The delay in addressing this motion was caused by this Court's granting of summary judgment on the only remaining issue in the case in favor of defendants, thus dismissing the case. However, this Court vacated that order on December 16, 1993, and gave plaintiffs an opportunity to respond to defendants' briefs that opposed granting leave to amend the complaint.

The proposed amended complaint includes a new claim that defendants violated the free exercise clause of the first amendment, as well as parental liberty. It also includes an expanded version of the right to privacy claim that was brought in the initial complaint.

Standard for Allowing Amendments to Complaints

Rule 15 of the Federal Rules of Civil Procedure provides that motions to amend should be freely granted unless the adverse party establishes the presence of such factors as undue prejudice, undue delay, bad faith, or dilatory motive. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Mere delay in bringing the additional claim is insufficient grounds for denying a motion to amend. *General Elec. Co. v. Sargent & Lundy*, 916 F.2d 1119, 1130 (6th Cir. 1990); *Moore v. City of Peducah*, 790 F.2d 557, 559-62 (6th Cir. 1986). The key factors to consider are a lack of notice and substantial prejudice. *Robinson v. Michigan Consolidated Gas Co.*, 918 F.2d 579, 591 (6th Cir. 1990)

"[W]hen the moving party has had an opportunity to assert the amendment earlier, but has waited until after judgment before requesting leave, a court may exercise its discretion more

exactingly." *State Trading Corp. v. Assuranceforeningen Skuld,* 921 F.2d 409, 418 (2nd Cir. 1990).

DISCUSSION

The proposed amended complaint includes additional facts to support the privacy and due process claims made in the original complaint for which summary judgment had been granted by this Court in March 1993, about four months prior to the motion to amend. There has been no showing why plaintiffs waited so long to amend the factual basis for the claims in the original complaint. The Court concludes that it was merely to avoid final summary judgment and not for any legitimate purpose.

The remaining amendments to the complaint assert that the defendants violated the free exercise clause of the first amendment. This religion claim seems to have been delayed for no excusable reason. Because plaintiffs are represented by the Rutherford Institute, which purports to be a religious institution, I believe that the failure to bring this claim until more than two years after the original complaint was filed is indicative of a lack of good faith, as well as the dilatory motive of seeking to avoid the possible summary judgment against them that was pending at the time of this motion. Furthermore, as discussed below, I agree with defendant Michael Fink that the free exercise clause claim would be futile. For both of these reasons, the amendment should not be allowed.

The critical element in a free exercise claim is "compulsion to affirm or deny a religious belief or to engage or deny a religious belief or to engage or refrain from engaging in a practice forbidden or required in the exercise of a plaintiff's religion." *Mozert v. Hawkins County Bd. of Educ.,* 827 F.2d 1058, 1069 (6th Cir. 1987), *cert. denied,* 98 L. Ed. 2d 993 (1988). The inquiry is whether the government has substantially burdened the observation of a central religious belief or practice,

and, if so, whether a compelling governmental interest justifies the burden. *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680, 699 (1989).

In the proposed amended complaint, plaintiffs state that they sincerely hold a religious belief that "centering," "guided imagery," meditation and certain relaxation techniques constitute forms of prayer forbidden by plaintiffs' own religious beliefs, in that these activities are directed toward one's self and not toward God. ¶ 85a(1) and (2) of the proposed amended complaint. Further, plaintiffs state that they believe that psychological or psychiatric treatment supplants biblical, parental, and church teachings in the sharing of values. They object to exercises that attempt to conform their values and beliefs to secular standards. ¶ 85b-d.

Although plaintiffs have alleged that some of the activities that plaintiff Jason Newkirk participated in constituted "prayers," they have made no allegation that the activities were hostile to religion. In fact, the activities seem clearly to have been neutral toward religion.

While neutral activities that seek to instill independent thought, tolerance of diverse views, self-respect, and logical decision-making have been held to not be an establishment of religion in *Smith v. Board of School Comm's of Mobile Co.*, 827 F.2d 684, 692 (11th Cir. 1987), plaintiffs note that their claim concerns interference with their free exercise of religion and not the establishment clause.

I agree with defendant Fink that the claims of plaintiffs in the proposed amended complaint are also beyond the scope of free exercise clause protections. Plaintiffs claim that the government's shaping of values interferes with their religious requirement that Jason Newkirk's values are to be taught only by his parents and by biblical and church teachings. ¶ 85b, c, and d of the proposed amended complaint. However, the inculcation of fundamental values as necessary to maintain a democratic

political system is one of the major objectives of public education. *See Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675, 681 (1986).

"Where parents choose to enroll their children in public schools, they cannot demand that the school program be tailored to meet their individual preferences, even those based on religion ...." *Roman v. Appleby,* 558 F. Supp. 449, 456 (E.D. Penn. 1983). If the teaching of religiously neutral values and skills to evaluate one's values can be found to be violative of someone's free exercise clause rights even when no effort is made to have the individual abandon values learned from religious or parental sources, then I believe the public schools would need to change their fundamental nature. Public schools could not pursue the important goal of instilling democratic values.

Although defendants did not mention it, I believe it is important to note that the proposed amended complaint never identifies any particular values being taught in the schools which are contrary to the values that plaintiffs contend they derived from their religion. Rather, it is the very fact that the school involves itself in teaching values and in activities to improve self-awareness and social skills that they apparently believe violates their religious convictions.

The allegations and facts in the proposed amended complaint do not sufficiently indicate that defendants have substantially burdened a central religious belief or practice. Plaintiffs remained free to follow their own religious beliefs and practices. To the extent that there is any burden, it is clearly outweighed by the compelling governmental interest in public education and in citizens with democratic values and social skills.

If plaintiffs' religion is inconsistent with one of the central objectives of the public school system, i.e., the teaching of values and social skills, then they were free to enroll their son in a private or parochial school, or they could teach him at home. *Mozert,* 827 F.2d at 1067. I do not believe that the public school

system could or should function in a way that avoids teaching values and social skills.

In short, even if all of the allegations and facts contained in the amended complaint and applicable to Count II were true, I believe it is unlikely that the cause of action would withstand a Rule 12(b)(6) motion. Therefore, the amendment would be futile.

For the foregoing reasons, plaintiffs' motion to file an amended complaint is denied.

DATED in Kalamazoo, MI:
January 7, 1994

/s/ Richard A. Enslen
Richard A. Enslen
United States District Court

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

JASON NEWKIRK
by Next Friends, Daniel
Newkirk and Nancy Newkirk;
DANIEL NEWKIRK;
and
NANCY NEWKIRK,

Plaintiffs

v

EAST LANSING PUBLIC SCHOOLS:
DR. WILLIAM MITCHELL; individually and in his official capacity as the Superintendent for Instruction;
SALLY McCLINTOCK, individually and in her official capacity as the Principal of Whitehills Elementary School;
JACKIE KILLINGSWORTH, individually and in her official capacity as a teacher;
ANN BLOOMQUIST, individually and in her official capacity as music teacher at Whitehills Elementary School;
MICHAEL FINK, individually and in his official capacity as Counselor of East Lansing Public Schools;
CREATIVE THERAPEUTICS, INC. a New Jersey Corporation;
and
DR. RICHARD GARDNER, individually,

File No. 1:91:CV:563
Hon. Richard A. Enslen

Defendants.

ORDER

In accordance with the Opinion entered this date;

IT IS HEREBY ORDERED that plaintiffs' motion to file an amended complaint, filed July 26, 1993 (dkt. #55), is **DENIED.**

DATED in Kalamazoo, MI
January 7, 1994

/s/ Richard A. Enslen
Richard A. Enslen
United States District Court

Supreme Court, U.S.
FILED
OCT 11 1995
CLERK

No. 95-379

In The

Supreme Court of the United States

October Term, 1995

JASON NEWKIRK, by Next Friends, Daniel Newkirk and Nancy Newkirk; DANIEL NEWKIRK; NANCY NEWKIRK,

Petitioners,

vs.

MICHAEL FINK, individually and in his official capacity as Counselor of East Lansing Public Schools,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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October 11, 1995

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Whether this Court should exercise its discretion to grant certiorari where Petitioners have failed to: raise any important constitutional issue not previously decided by this Court, identify any conflict among the Circuit Courts regarding an issue germane to this case, appeal any statutory cause of action, or establish that the lower courts erred in their decisions; and where Respondent is entitled to qualified immunity.

II. Whether the constitutional right of privacy extends to the daily operations of schools to require educators to obtain informed written consent from the student's parents before meeting with the student pursuant to a teacher referral.

LIST OF PARTIES

Petitioners Jason Newkirk, Daniel Newkirk and Nancy Newkirk are individuals.

Respondent Michael Fink is an individual. He is being sued in both his individual capacity and in his official capacity as a guidance counselor in the East Lansing Public Schools, East Lansing, Michigan.

The following were also parties to the proceedings in the United States District Court for the Western District of Michigan and in the Ingham County Circuit Court for the State of Michigan: the East Lansing Public Schools; Dr. William Mitchell, individually and in his official capacity as the superintendent of the East Lansing Public Schools; Sally McClintock, individually and in her official capacity as the principal of the Whitehills Elementary School; Jackie Killingsworth, individually and in her official capacity as a classroom teacher at the Whitehills Elementary School; Ann Bloomquist, individually and in her official capacity as a music teacher at the Whitehills Elementary School; Creative Therapeutics, Inc., a New Jersey corporation; and Dr. Richard Gardner, individually.[1]

Petitioners incorrectly assert that the East Lansing Public Schools and its superintendent, principal and teachers were parties to the proceedings in the United States Court of Appeals for the Sixth Circuit. *Pet.* at ii.[2] These parties were dismissed pursuant to stipulation and order during the District Court

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1. Dr. Gardner developed "*The Talking, Feeling and Doing Game*," which is produced and sold by Creative Therapeutics, Inc.

2. The following abbreviations designate the following pleadings/records: *Compl.* - Complaint; *Pet.* - Petition; *Pet., App.* - Appendix to Petition; *Resp., App.* - Respondent's Appendix; *R.* - Record on Appeal.

proceedings. *Pet., App.* D. Mr. Fink was the only defendant-appellee in the appeal to the United States Court of Appeals for the Sixth Circuit. *See Pet., App.* at E-2 ("plaintiffs appeal the judgment on the right-to-privacy count as to the guidance counselor only").

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No. 95-379

In The

Supreme Court of the United States

October Term, 1995

JASON NEWKIRK, by Next Friends, Daniel Newkirk and Nancy Newkirk, DANIEL NEWKIRK; NANCY NEWKIRK,

Petitioners,

vs.

MICHAEL FINK, individually and in his official capacity as Counselor of East Lansing Public Schools,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Michael Fink, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioners, Jason Newkirk, Nancy Newkirk, and Daniel Newkirk.

OPINIONS BELOW

On July 8, 1991, Petitioners brought suit in the United States District Court for the Western District of Michigan against the East Lansing Public Schools, William Mitchell (superintendent), Sally McClintock (principal), Jackie Killingsworth (classroom teacher), Ann Bloomquist (music teacher), and Michael Fink (guidance counselor). Count I of the complaint alleged a violation of Petitioners' constitutional right to privacy. Count II alleged a violation of the Protection of Pupil Rights Amendment ("P.P.R.A."), 20 U.S.C. § 1232h. Counts III through VII alleged various pendant state law claims, which were dismissed by the District Court three weeks after the complaint was filed. *Pet., App. F.*

Petitioners subsequently refiled the following claims in the Ingham County (Michigan) Circuit Court: (1) violation of the right to privacy under the Michigan Constitution, (2) tortious invasion of privacy, (3) intentional infliction of emotional distress, (4) medical malpractice, (5) negligence, and (6) products liability. *Ingham County Circuit Court No. 92-72034-AZ.* Extensive discovery took place in the state case, including the depositions of the parties (seven), lay witnesses (nine), and expert witnesses (seven). In the midst of discovery, but prior to the filing of dispositive motions, all defendants except Respondent were dismissed pursuant to stipulation and order. No attendant settlement documents were filed. Following discovery, the state court dismissed Petitioners' remaining claims and entered final judgment in Respondent's behalf. *Resp., App. A.* Petitioners did not exercise their appeal of right from final judgment in the state case, and the deadline for appeal has expired.

On March 31, 1993, the District Court granted partial summary judgment for all defendants, dismissing Count I of the

complaint (constitutional privacy right). *Pet., App. A.* Nearly two years after filing their complaint and almost four months after summary judgment on the privacy claim, Petitioners sought leave to amend their complaint to expand the constitutional privacy claim brought in the original complaint to a "due process and constitutional right of privacy" claim, and to add a claim for violation of parental liberty and First Amendment free exercise rights. *R.* 649. The District Court denied Petitioners' motion to amend. *Pet., App. H.*

The District Court later dismissed Count II of the complaint (violation of the P.P.R.A.). *Pet., App. B.* Petitioners then filed a motion to alter or amend judgment, which was denied for Count I (privacy) and granted for Count II (P.P.R.A.). *Pet., App. C.* However, by stipulation and order filed on March 28, 1994, the District Court dismissed Count II (P.P.R.A.) as to all parties. Petitioners also stipulated to dismiss from the federal litigation all defendants, except Respondent. *Pet., App. D.* No attendant settlement documents were filed.

This litigation was *not* brought solely "against the school district and counselor," but also against the school superintendent, principal, classroom teacher, music teacher, Creative Therapeutics, Inc., and Dr. Richard Gardner. *Compare Pet.* at 4 *with Pet.* at ii. Contrary to Petitioners' assertion, the District Court did *not* hold that there was no constitutional violation of parental rights to "even see the records." *Compare Pet.* at 4 *with Pet., App. B.* No cause of action was ever pled relative to Petitioners' records request.

Petitioners appealed to the United States Court of Appeals for the Sixth Circuit *only* as to Respondent. Although the appeal was untimely, the District Court granted Petitioners' motion to extend time for filing notice of appeal. The Sixth Circuit affirmed

the District Court's rulings, without opinion, as to the grant of summary judgment on the privacy count and the denial of the motion to amend complaint. *Pet., App. E.*

STATEMENT OF JURISDICTION

The jurisdiction of this Court for review by Petition for Writ of Certiorari is invoked under 28 U.S.C. § 1254(1). Petitioners seek review of a decision made by the Sixth Circuit Court of Appeals on June 13, 1995, which affirmed the District Court's grant of summary judgment in favor of Respondent regarding Petitioners' constitutional privacy claim. Because Petitioners have not asked this Court to review the District Court's denial of their motion to amend complaint, this Court does not have jurisdiction over Petitioners' "due process" and "parental liberty" claims which were presented in the proposed amended complaint. *R.* 694.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

As pled in their complaint, Petitioners' privacy claim is based on the constitutional and statutory provisions listed below and fully set forth in Respondent's Appendix D.

Constitutional Provisions

U.S. Const. art. I, § 9, cl. 3.

U.S. Const. amends. I, IV, V, IX, and XIV.

Statutory Provisions

42 U.S.C. § 1983.

COUNTER-STATEMENT OF THE CASE

In October 1989, Jason Newkirk's teacher, Mrs. Killingsworth, contacted Nancy Newkirk to discuss concerns about Jason. Mrs. Killingsworth recommended that Jason see Mr. Fink, the school guidance counselor. *Compl.*, ¶ 18. Mrs. Killingsworth was concerned because Jason had been found playing with matches and was having difficulty socializing with other children. *Compl.*, ¶ 23. During this discussion, Mrs. Newkirk told Mrs. Killingsworth that Jason could see Mr. Fink to "play games." *Compl.*, ¶ 20. Petitioners have neither alleged nor produced evidentiary support that Mr. Fink heard from either Mrs. Newkirk or Mrs. Killingsworth about any "conditions" for seeing Jason. *See contra Pet., 3.*

Shortly after her discussion with Jason's mother, Mrs. Killingsworth completed a "*Referral to Child Guidance Consultant*" form. *Compl.*, ¶ 21; *Resp., App. C.* This form is dated November 3, 1989, and states, in pertinent part:

> Jason is an angry child. He needs to talk, identify his anger and how to talk about his feelings and concerns. Jason needs a good friend. Example: If he has a good day. What made it go well —

Resp., App. C. With Mrs. Newkirk's knowledge, Mr. Fink met with Jason pursuant to Mrs. Killingsworth's referral.

Later that month, Mr. Fink talked with Daniel Newkirk about Jason's school difficulties. Petitioners allege that Mr. Newkirk "expressly forbade Mr. Fink to counsel Jason." *Compl.*, ¶ 25.[3]

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3. The District Court noted "It is, at best, a debatable issue whether Mr. & Mrs. Newkirk did not consent to counseling. However, for purposes of this [summary judgment] motion, I assumed they did not consent." *Pet., App.* at A-13, n.6.

Mr. Fink nonetheless understood Mr. Newkirk's response to permit him to meet with Jason. Pursuant to the teacher's referral, Mr. Fink met with Jason once a week to play checkers, pick-up sticks, the "Operation" game, and indoor basketball and soccer. Mr. Fink twice played "*The Talking, Feeling and Doing Game*" for no longer than 15 minutes and once read from *The Kids' Book of Questions*.

Petitioners have no basis to claim that they became aware of Mr. Fink's meetings with Jason only "after several months" and after they had "demanded to know what was happening at school." *Pet.* at 3. Petitioners acknowledge that Mrs. Newkirk had told Mrs. Killingsworth that Jason could meet with Mr. Fink "to play games." *Compare Pet.* at 3 *with Compl.*, ¶ 20. There is neither an allegation nor evidentiary support that Petitioners "on several occasions" during the school year made inquiries to Mr. Fink or "demanded to know what was happening at school." *Pet.* at 3.

Similarly, there is no evidence that Mr. Fink either refused to cooperate with Petitioners' "orders" not to continue meeting with Jason or disregarded their request for Jason's school records. *Pet.* at 4. Petitioners removed Jason from school in the midst of the following school year because the *principal* denied their request to have Jason exempt from the "conflicts resolution" curriculum utilized in his social studies class. *Pet., App.* at A-3 and A-17; *Compl.*, ¶ 41 (Jason "was subsequently removed . . . due to the *school's* refusal to exempt him . . .") (emphasis added). However, both the principal and the school district were dismissed from this litigation pursuant to Petitioners' stipulation.

Petitioners' characterization of *The Talking, Feeling, and Doing Game* as a "treatment tool to be used only by trained psychiatric professionals" contradicts the game's statement indicating that it is to be used by "mental health professionals."

Compare Pet. at 3 with *Pet.* at 11. Acknowledging that Respondent is a social worker, as well as a school guidance counselor, Petitioners erroneously assert that Respondent is not a "mental health professional" because he is not a psychiatrist. *Pet.* at 11.

Petitioners' Statement of the Case includes misrepresentations for which there is neither support in the federal court record nor contradictory evidence developed through discovery in the companion state law case. For example, the federal court record contains no support for the assertion that Jason was a "normal, quiet little boy." *Pet.* at 3. Testimony of school officials and expert witnesses in the state court case supports the opposite conclusion. Petitioners' complaint also demonstrates that Jason's third grade teacher did *not* worry that Jason was "too quiet," but rather expressed concerns about Jason's playing with matches and his lack of socialization skills. *Compl.*, ¶ 23; *see also Resp., App. C.* (Jason is an "angry child.")

Petitioners place great reliance on the affidavit of their expert witness, Dr. William A. Decker. *Pet.* at 15-16. Dr. Decker's opinion is far from uncontradicted and remains a legal conclusion, not "fact." Dr. Decker's affidavit was submitted to the District Court nearly five months after entry of summary judgment. The District Court noted that Petitioners were "simply trying to reargue positions that this Court rejected or are attempting new arguments that should have been raised earlier." *Pet., App.* at C-3. Dr. Decker's "opinions" were also submitted to the state court, which nonetheless dismissed Petitioners' claims against Respondent. *Resp., App. A.*

SUMMARY OF THE ARGUMENT

This case presents no issue appropriate for this Court's exercise of discretionary jurisdiction because it does not involve an important or unresolved constitutional issue, nor does it

conflict with rulings of the Circuit Courts. Petitioners' federal statutory claim was dismissed pursuant to stipulation and order, and was never appealed. The asserted conflict with state statutory provisions has neither been pled nor appealed. Respondent is also entitled to qualified immunity.

The decisions of the lower courts are not erroneous. The District Court declined to constitutionalize a tort case. Relying on this Court's long-standing reluctance to interfere with the operations of the public schools, the District Court identified "common sense" reasons why it should not recognize Petitioners' claim as a fundamental right protected by the Constitution. The Sixth Circuit affirmed this decision without opinion.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS HAVE NOT IDENTIFIED ANY LEGITIMATE BASIS FOR THIS COURT TO EXERCISE ITS DISCRETION TO GRANT CERTIORARI.

Petitioners fail to satisfy the criteria traditionally applied by this Court in determining whether to grant certiorari. This case involves no important or unresolved constitutional issue. Petitioners have not demonstrated that the unpublished decisions of the lower courts are inconsistent with decisions of this Court, nor have Petitioners identified any conflict among the Circuit Courts regarding the issue involved in this case — Petitioners' right to privacy. The asserted "conflict" with federal and state statutes is not before this Court.

The facts in this litigation are sufficiently unique so that the precedential value in the unpublished decisions of the District Court and Sixth Circuit is likely to be minimal. The issue

presented by Petitioners has arisen only once and has no impact beyond the immediate parties. Because Respondent is entitled to qualified immunity, further discovery or a trial on the merits is precluded.

A. This Case Does Not Involve an Important or Unresolved Constitutional Issue.

The District Court acknowledged the unusual circumstances of Petitioners' cause of action:

> Both parties agree that no court has ever recognized a right to privacy in a factual situation similar to the case before the Court. This, of course, does not mean that no such right exists. Instead, the Court must look to analogous situations in order to determine if a right to privacy exists here.

Pet., App. at A-5. In its effort to "determin[e] the scope of the constitutionally protected right to privacy," the District Court carefully considered the cases cited by Petitioners. *Pet., App.* at A-5 to A-7. However, noting this Court's posture in *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986) and *New Jersey v. T.L.O.*, 469 U.S. 325, 342, n.8 (1985), the District Court observed that "when dealing with the rights of students, courts have been less willing to find a broad right of privacy." *Pet., App.* at A-7. The District Court then analyzed Petitioners' claim in light of decisions from this Court and other federal courts relative to student rights in the school. *Pet.*, at A-7 to A-12.

The District Court's observations were reinforced last term by this Court in *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386 (1995). Examining the constitutional privacy interest of a junior high school student who declined to submit to random urinalysis

testing as a condition of his participation in school sports, this Court held that the Constitution "does not protect all subjective expectations of privacy, but only those that society recognizes as 'legitimate.'" *Id.* at 2391 (*citing New Jersey v. T.L.O.*, 469 U.S. at 338). Finding that certain privacy expectations vary with context, this Court recognized the special circumstances innate to our Nation's public schools and held that "while children assuredly do not shed their constitutional rights . . . at the schoolhouse gate, . . . the nature of those rights is what is appropriate for children in school." *Vernonia*, 115 S. Ct. at 2391-92 (citations omitted). Moreover, " 'students within the school environment have a lesser expectation of privacy than members of the population generally.' " *Vernonia*, 115 S. Ct. at 2392 (quoting *New Jersey v. T.L.O.*, 469 U.S. at 348 (Powell, J., concurring)).

This Court's decisions regarding a familial right to privacy, relied on by Petitioners, are restricted to circumstances in which due process considerations were triggered by state proceedings which irrevocably severed the relationship between parent and child: *Santosky v. Kramer*, 455 U.S. 745 (1982);[4] statutorily presumed that unwed fathers are neglectful, *Stanley v. Illinois*, 405 U.S. 645 (1972); or interfered with a parental decision to commit a child to state mental health facilities, *Parham v. J.R.*, 442 U.S. 584 (1979).

Petitioners also rely on cases which address a statute or local ordinance imposing criminal sanctions: finding unconstitutional a statute that prohibited teaching any foreign language beyond the eighth grade, *Meyer v. Nebraska*, 262 U.S. 390 (1923); finding unconstitutional a statute which imposed a criminal penalty on a parent for not sending a school-age child to school, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925);[5] upholding the

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4. Petitioners miscite *Santosky*, *supra*, as 455 U.S. 743. *Pet.* at 8.

5. The cited language in *Pierce*, *supra*, relied upon by Petitioners is at 534-35. *Pet.* at 8.

conviction under a state child labor law of a woman who allowed her young niece to sell religious tracts on public sidewalks, *Prince v. Massachusetts*, 321 U.S. 158 (1944); and finding unconstitutional a housing ordinance which limited occupancy to members of a single family, *Moore v. City of East Cleveland*,[6] 431 U.S. 494 (1977).

Despite the dicta in those cases regarding parental prerogatives in child rearing, this Court noted that the rights of parents or the family are not beyond limitation or regulation. *See, e.g., Prince*, 321 U.S. at 166; *Moore*, 431 U.S. at 499. These are constitutionally significant distinctions, explicitly recognized by the Courts that authored those opinions. They do not provide a basis for this Court to require, as a matter of constitutional law, that a school official first obtain "written, full, and informed consent" from parents or guardians before meeting with a student. *Pet.* at 11.

B. No Conflict with the Circuit Courts Has Been Identified.

Without citation, Petitioners assert that "[d]ecisions of courts in all circuits, including the Sixth Circuit, are in conflict with the decision in the instant case." *Pet.* at 5. However, it is clear that no such intra-circuit or inter-circuit conflicts exist. The Sixth Circuit affirmed the District Court's decision in this case and found no conflict within the Sixth Circuit. *Pet., App. E.* Petitioners' perceived intra-circuit conflict was never raised through a request for re-hearing or hearing *en banc*.

The only Circuit Court case cited in the Petition is *Arnold v. Board of Educ.*, 880 F.2d 305 (11th Cir. 1989), upon which the District Court relied to support its decision to dismiss Petitioners' privacy claim. *Pet., App.* at A-14 to A-15. Petitioners attempt to

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6. Petitioners erroneously refer to this case as "*City of Cleveland*." *Pet.* at 6.

distinguish *Arnold* from the present case based on the age differences of the children involved and on the alleged "coercion" used so Jason Newkirk would not inform his parents about the counseling. *Id.* at A-15. Legal distinctions relative to age level are generally set by the legislative branches of government. As for the alleged " coercion," the District Court found:

> Here, there is no such "coercion" claim, nor is there any evidence that defendants "coerced" Jason into counseling sessions with Mr. Fink. Plaintiffs allege, without any evidentiary support, that Mr. Fink said to Jason, "do not tell your parents," presumably about the counseling sessions. I do not believe that this unsupported factual statement, if true, rises to the level of "coercion" under *Arnold*, *supra*.

Pet., App. at A-14, n.9. The fact that Petitioners disagree with the District Court's conclusion does not create a conflict among the Circuit Courts, particularly when only one Circuit Court case has been cited. Petitioners have not established the existence of an inter-Circuit conflict, nor the importance of resolving this illusory conflict.

C. No Cause of Action Based on Federal or State Statutory Provisions Has Been Pled, Appealed, or Identified as Conflicting with the Constitution.

Petitioners urge this Court to grant certiorari to resolve the "conflict with federal statutory and Constitutional provisions." *Pet.* at 5. Without citation, Petitioners also refer to "federal legislation" relative to informed consent from parents which is allegedly necessary for a minor to obtain health care. *Pet.* at 5, 11, 15, 16-17. Even if such authority had been offered, no cause of action under this phantom federal legislation was ever pled.

Although the complaint initially included a claim for violation of the Protection of Pupil Rights Amendment, 20 U.S.C. § 1232h, this claim was voluntarily dismissed pursuant to stipulation and order. *Resp., App. B.* Petitioners did not seek appellate review of this federal statutory claim.

Petitioners similarly assert that the District Court's decision conflicts with state law regarding parental consent. *Pet.* at 11, 15, 16-17. Petitioners cite to three Michigan statutory provisions[7] regarding hospital treatment of emotionally disturbed minors, surgery for mental health patients, and the right of parents to obtain medical records of their minor children. *Pet.* at 15. Petitioners have never asserted these statutory provisions as the basis for a cause of action in this case, perhaps because hospital care and surgery are far from commensurate with the work of Mr. Fink, a school guidance counselor.

The constitutional separation of powers requires Congress and the state legislatures to conform their legislation to this Court's view of the Constitution. However, Petitioners confuse this Court's role with those of Congress and the state legislatures and, on the issue of consent for health care treatment of minors, invite this Court to conform its view of the Constitution to federal and state statutes. Because such action results in the "tail wagging the dog," Petitioners' inappropriate invitation should be declined.

D. Respondent Is Entitled to Qualified Immunity.

The District Court found that Petitioners did not state a claim for violation of their constitutional privacy right. This case was summarily dismissed and the issue of qualified immunity raised in Respondent's motion for summary judgment was not

7. Petitioners miscite Section 716 of the Michigan Public Health Code (Mich. Comp. Laws Ann. 333.1716) as M.C.L. 300.1716. *Pet.* at 15.

addressed. Qualified immunity shields public officials performing discretionary functions from liability for civil damages insofar as their conduct does not violate "clearly established" statutory or constitutional rights of which a reasonable person would have known. *Davis v. Scherer*, 468 U.S. 183, 194 n.12 (1984). The test is an objective standard. Resolution of qualified immunity is a question of law. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

In this case, the District Court noted that it had difficulty "determining Petitioners' actual privacy claims." *Pet., App.* at A-11, n.4. Yet, it is well established that the constitutional right must not be stated in general terms, but must be sufficiently particularized to place potential defendants on notice that their conduct is probably unlawful. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The fact that the District Court was unable to ascertain a constitutional claim alone shows that the right asserted by Petitioners was neither "sufficiently particularized" nor "clearly established," such that Respondent would have known his conduct was unlawful. Even if this Court granted certiorari and reversed the rulings of the lower courts, the viability of Respondent's qualified immunity would preclude further discovery or even a trial on the merits. *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982).

II.

THE DECISIONS OF THE LOWER COURTS ARE NOT ERRONEOUS.

Review on certiorari is also inappropriate in this case because the reasons articulated by the District Court for dismissing Petitioners' claim, as affirmed by the Sixth Circuit, are not erroneous.[8] The District Court demonstrated remarkable

8. Denying Petitioners' motion to amend or alter judgment, the District (Cont'd)

clairvoyance in relying, in part, on *Acton v. Vernonia Sch. Dist. 47J*, 796 F. Supp. 1354, 1361 (D. Or. 1992) (upholding random drug testing of student athletes, the court stated, "courts have acknowledged that the public school is a unique setting in which the constraints of the Fourth Amendment are 'relaxed.'") *Pet. App.* at A-8. Last term, this Court upheld that ruling. *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386 (1995). *See* discussion *supra*.

The cases cited by Petitioners do not suggest a different outcome. The courts below reached the correct result through a careful analysis of case law. The lower courts appropriately rejected Petitioners' invitation to constitutionalize a tort case by creating a new niche in privacy law. Instead, the courts adopted a common sense interpretation of the Constitution which recognized the unique circumstances of this case and the long-standing position of the federal judiciary not to interfere with the operations of the public schools.

A. Tort Allegations Should Not Be Constitutionalized.

This Court is neither an arbiter of state tort law claims nor a regulator of professional licensing matters. Petitioners urge this Court to constitutionalize a tort or licensing matter based on Respondent's alleged refusal "to follow the law regarding proper and informed consent for psychological health care of minors." *Pet.* at 6. Such circumstances do not justify intervention by this Court and are more appropriate for review by a state court or administrative agency.[9]

(Cont'd)
Court found that Petitioners were rearguing positions that the Court rejected or "attempting new arguments that should have been raised earlier." *Pet., App.* at C-3. The District Court, however, found "no clear error in its original Opinion relative to the dismissal of the privacy claim." *Id.*

9. The District Court noted that although no constitutional violation was
(Cont'd)

This Court has previously rejected constitutional claims which would "impose federal duties that are analogous to those traditionally imposed by state tort law." *Collins v. Harker Heights*, 503 U.S. 115, 128 (1992). *See also Daniels v. Williams*, 474 U.S. 327, 332 (1986) (holding that the Constitution "does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society"); *Baker v. McCollan*, 443 U.S. 137, 146 (1979) (stating that because Section 1983 imposes liability for violations of constitutional rights, not for violations of duties of care arising out of tort law, remedy for the latter type of injury "must be sought in state court under traditional tort-law principles"); *Ingraham v. Wright*, 430 U.S. 651, 672 (1977) (holding that "traditional common-law remedies are fully adequate to afford due process" even though a student has a liberty interest from bodily restraint and punishment); *Paul v. Davis*, 424 U.S. 693, 701 (1976) (rejecting reasoning that "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States"). This case presents no reason for this Court to depart from these holdings.

B. Federal Courts Should Not Interfere with the Operations of the Public Schools.

Petitioners' case involves an issue which should be addressed at the state and local level, and not by the federal courts. Local control over public schools is one of this Nation's most deeply rooted and cherished traditions. *Milliken v. Bradley*,

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(Cont'd)

presented, such a finding "does not preclude a holding by a different court that defendants may have committed a common law tort against plaintiffs." *Pet., App.* at A-13, n.7 and A-16, n.13. Petitioners' tort claims (invasion of privacy, intentional infliction of emotional distress, and medical malpractice) were subsequently dismissed by the State Court. *Resp., App. A.*

418 U.S. 717, 741-42 (1974). Because the dispute in this case does not go beyond the constitutional pale, this Court should not interfere with the operations of the public schools.

This Court has long recognized that local school authorities have broad discretion in the management of school affairs. In *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968), this Court reaffirmed that "public education in our Nation is committed to the control of state and local authorities" and that federal courts "do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." In *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 507 (1969),[10] this Court noted that it has "repeatedly emphasized . . . the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools." In *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985), this Court recognized that the special nature of the school setting "requires some easing of the restrictions" regarding certain constitutional parameters. Because "[j]udicial interposition in the operation of the public school system of the Nation poses problems requiring care and restraint," *Epperson*, 393 U.S. at 104, this Court should similarly exercise restraint and decline to grant certiorari in a matter which is more appropriately addressed by state and local authorities.

In the present case, the local school authorities responded to Petitioners' concerns. The school superintendent reviewed Petitioners' concerns and formed a committee to develop policy language, for the Board of Education's consideration, regarding counseling roles and the use of supplemental materials. *R.* 162. The superintendent's letter to Petitioners, in part, stated:

> I have explored the concerns you have levied

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10. Petitioners miscite *Tinker, supra*, as 383 U.S. 503. *Pet.* at 7.

> against Mr. Michael Fink in his dealing with your son, Jason. I have listened to both you and Mr. Fink relative to what was said and understood in your meetings. I must assume that both you and Mr. Fink are sincere and that communication toward developing an understanding did not occur. However, I do not feel that Mr. Fink had any intent other than to assist Jason. Had he felt that he was not supposed to work with Jason, he would not have scheduled the meeting with you in June [1990]. You have indicated that you do not want Mr. Fink to counsel with Jason and Mr. Fink acknowledged your request in writing in June. That was reaffirmed during our meeting in September [1990].

R. 163. Given the responsiveness of local school authorities, it is not appropriate for the federal courts to intervene. It is "not the role of the federal courts to set aside decisions of school administrators [even those] which the court may view as lacking a basis in wisdom or compassion." *Wood v. Strickland*, 420 U.S. 308, 326 (1975).

C. The Constitution Should Be Interpreted with Common Sense.

Common sense also dictates that this Court deny certiorari. After all, "[c]ommon sense requires that the Constitution must be interpreted in the light of certain facts, which are inherent in the human condition." *Bahr v. Jenkins*, 539 F. Supp. 483, 487 (E.D. Ky. 1982). Here, the District Court interpreted a student's right to privacy in light of "common sense" considerations which are intrinsic to the operation of public schools. The District Court provided at least three common sense reasons for not requiring

school counselors to receive parental consent before working with students: (1) a child may be having difficulty with his or her parents (or may be a victim of abuse);[11] (2) schools often deal with a student who is a discipline or behavioral problem by sending the student to a counselor; and (3) counselors are often under a statutory obligation not to reveal the confidence of their relationships with students.[12] *Pet., App.* at A-15 to A-16. The District Court concluded that it is not a violation of constitutional privacy to "counsel a student because s/he is 'having trouble socializing' with other students (or is a discipline problem)." *Id.* at 16.

Imposing a "privacy rights" analytical framework on disputes regarding consent in the school setting would create a "Pandora's box" of legal issues for school officials and the courts to consider. Petitioners specifically request that this Court establish a standard "that school officials exercise zealous care that nothing is done which could adversely affect the future relationship of the student with his parents, or his capacity to partake fully of normal developmental stages and learning processes." *Pet.*, at 10. Petitioners have not carefully considered the practical effect or ramifications of the rule that they would have this Court adopt. Would this Court establish a "zealous care" standard? Would this standard differ based on a child's age? If so, on what basis would this Court establish the age differential? Finally, would this standard chill the ability of school officials to

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11. The District Court acknowledged that the "record reflects no allegations of child abuse." *Pet., App.* at A-15, n.10.

12. The District Court acknowledged that Michigan has not codified a student-counselor privilege, although it has codified a "psychologist/psychiatrist-student" privilege. Mich. Comp. Laws Ann. § 330.1750 (West 1992). However, Michigan statutory law does prohibit a guidance counselor from disclosing confidential student communications in court, except with consent. Mich. Comp. Laws Ann. § 600.2165 (West 1989).

speak to the children under their care? This case plainly speaks volumes about the reasons underlying the federal court's reluctance to intervene in day-to-day school operations.

Petitioners also claim a violation of their privacy right because Mr. Fink "initiated treatment" by reading to Jason from *The Kids' Book of Questions*. *Compl.*, ¶ 26; *Pet.*, at 12. This innocuous book was mentioned in a *Chicago Tribune* article about activities for kids while traveling:

> Put on your thinking cap with "The Kids' Book of Questions" by Gregory Stock. Look for it at the library or a bookstore. (It's $4.95.) It has 260 fun, and sometimes serious, questions — with no right or wrong answers. Here are some examples: "Would you eat a worm sandwich if doing so meant that next week you could appear on your favorite TV show?" or "If you could be invisible for a day, what would you do?" Take turns reading and answering questions.

Candace Purdom, *Road Trip Ahead? Games Bring Boredom to a Screeching Halt*, Chi. Trib., August 3, 1993, § C at 5. A common sense interpretation of the Constitution would not conclude that a teacher violates the Constitution by reading excerpts from this book to a student.

Recognizing the "ever-expanding duties of schoolteachers," this Court has noted that "[t]here is an ongoing relationship, one in which the teacher must occupy many roles — educator, adviser, friend, and, at times, parent-substitute. It is rarely adversary in nature. . . ." *Vernonia*, 115 S. Ct. at 2396 (quoting *Goss v. Lopez*, 419 U.S. 565, 594 (1975) (Powell, J., dissenting) (footnote omitted)). Teachers, counselors, administrators, and

coaches meet with students every day to discuss matters which range from the mundane to matters of life and death. If school officials were subject to constitutional liability in every encounter with a student, these important tasks would be infinitely more complex and so severely defined or regulated as to be unachievable. Respondent submits that the Constitution does not require this result.

CONCLUSION

Because this case presents no issue appropriate for this Court's review, and because the lower courts' holdings were not in error, Petitioners' Writ of Certiorari is unjustified and, therefore, should be denied.

Respectfully submitted,

LISA L. SWEM
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October 11, 1995

APPENDIX A — REFERRAL TO CHILD GUIDANCE CONSULTANT DATED NOVEMBER 3, 1989

REFERRAL TO CHILD GUIDANCE CONSULTANT

Student(s) name(s): *Jason Newkirk*

Person Making Referral: *Jackie Killingsworth*

Date: *11/3/89*

Initial request:

✓ individual student need
___ small group need
___ whole class need
___ peer relationship need
___ teacher consultation
___ other, please specify _____

___ class observation
___ individual observation
___ student request
___ parent consultation

Would you please describe and explain your concern(s) below:

Jason is an angry child. He needs to talk, identify his anger and how to talk about his feelings and concerns.

Jason needs a good friend.

Example: If he has a good day. What made it go well –

If you have a specific request or expectation of me would you also explain below:

Be his friend and be there for him. I don't want (for him) all his eggs in one basket.

APPENDIX B — STIPULATION AND ORDER FILED MARCH 28, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

CASE NO. 1:91-CV-563

RICHARD A. ENSLEN
U.S. DISTRICT JUDGE

JASON NEWKIRK, by Next Friends, DANIEL NEWKIRK and NANCY NEWKIRK and DANIEL NEWKIRK and NANCY NEWKIRK,

Plaintiffs,

v.

EAST LANSING PUBLIC SCHOOLS, DR. WILLIAM MITCHELL, SALLY MCCLINTOCK, JACKIE KILLINGSWORTH, ANN BLOOMQUIST and MICHAEL FINK,

Defendants.

David R. Melton (P38986)
Attorney for Plaintiffs
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Appendix B

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STIPULATION AND ORDER FOR DISMISSAL

NOW COME the Plaintiffs Jason Newkirk, by Next Friends Daniel Newkirk and Nancy Newkirk and Daniel Newkirk and Nancy Newkirk, by and through their counsel David R. Melton, and Defendant Michael Fink by and through his counsel Thrun, Maatsch and Nordberg, P.C. to hereby stipulate and agree that the remaining count in the above-captioned cause of action be dismissed as to Defendant Michael Fink, in both his individual and official capacities, with prejudice and without costs to either party.

Appendix B

Dated: 3-21-94

s/ David R. Melton
David R. Melton (P38936)
THE RUTHERFORD INSTITUTE
OF MICHIGAN
Attorney for Plaintiffs

Dated: 3-21-94

s/ Richard E. Holmes
Richard E. Holmes (P38936)
SMITH, HAUGHEY, RICE & ROEGGE
Attorney for Defendants
East Lansing Public Schools,
Dr. William Mitchell, Sally
McClintock, Jackie Killingsworth,
and Ann Bloomquist

Dated: 3-21-94

s/ Lisa L. Swem
Lisa L. Swem (P42051)
Donald J. Bonato (P23244)
THRUN, MAATSCH AND NORDBERG, P.C.
Attorneys for Defendant
Michael Fink

Appendix B

ORDER

At a session of said Court, held in the City of Kalamazoo, State of Michigan, on this the 28th day of March, 1994.

PRESENT: HONORABLE RICHARD A. ENSLEN

IT IS SO ORDERED.

s/ Richard A. Enslen
Hon. Richard A. Enslen

APPENDIX C — FINAL JUDGMENT AND ORDER DATED DECEMBER 13, 1994

STATE OF MICHIGAN
INGHAM COUNTY CIRCUIT COURT

CASE NO. 92-72034-AZ

HON. CAROLYN STELL
CIRCUIT COURT JUDGE

JASON NEWKIRK, by Next Friends, DANIEL NEWKIRK and NANCY NEWKIRK and DANIEL NEWKIRK and NANCY NEWKIRK

Plaintiffs,

v.

MICHAEL FINK,

Defendant.

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Appendix C

FINAL JUDGMENT AND ORDER GRANTING DEFENDANT FINK'S MOTION FOR SUMMARY DISPOSITION

FINAL JUDGMENT AND ORDER

At a session of said Court held in the Circuit Court for the County of Ingham, State of Michigan, on the 13th day of December, 1994.

PRESENT: HONORABLE CAROLYN STELL, CIRCUIT COURT JUDGE

At a hearing held November 30, 1994, on Defendant Fink's Motion for Summary Disposition, the parties having briefed the Motion, the Court having been fully advised on the premises, and the Court having issued its opinion from the bench,

IT IS NOW THEREFORE ORDERED for the reasons stated by the Court on the record, that Defendant Fink's Motion for Summary Disposition pursuant to MCR 2.116(C)(10) is granted as to Count III (intentional infliction of emotional distress) of Plaintiffs' Amended Complaint.

In that the Court previously granted Defendant Fink's Motion for Summary Disposition pursuant to MCR 2.116(C)(8) as to Counts I (constitutional privacy), II (tortious invasion of privacy) and IV (medical malpractice), this Order constitutes final judgment of this action and Plaintiffs' Amended Complaint is dismissed in its entirety with prejudice.

IT IS SO ORDERED.

Appendix C

s/ Carolyn Stell
CAROLYN STELL, Circuit Judge

Countersigned:
s/ LOLA WILLIAMS
Deputy Clerk

Prepared by:
Lisa L. Swem (P42051)
THRUN, MAATSCH & NORDBERG, P. C.
Attorney for Defendant Fink

Approved as to Form:
s/ David R. Melton
David R. Melton (P8986)
THE RUTHERFORD INSTITUTE
Attorney for Plaintiffs

APPENDIX D — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Although Petitioners cite only to the Ninth and Fourteenth Amendments in their Petition, Count I of Petitioners' complaint alleges that Respondent, along with others:

> [D]eprived [Petitioners] of their rights under Article I, Section 9, Clause 3 and the First, Fourth, Fifth, Ninth and Fourteenth Amendments of the United States Constitution, in violation of 42 U.S.C. §§ 1983 and 1988, rendering [him] liable to the [Petitioners].

Compl. at ¶ 47. Those constitutional and statutory provisions are set forth below.

Constitutional Provisions

U.S. Const. art I, § 9, cl. 3.

> No Bill of Attainder or ex post facto Law shall be passed.

U.S. Const. amend. I.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Appendix D

U.S. Const. amend. IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. IX.

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Appendix D

U.S. Const. amend. XIV, § 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutory Provision

42 U.S.C. § 1983.

> Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution an laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.